Supreme Court, U.S.
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No. 06-476

In The

Supreme Court of the United States

Gary P Brogdon
Petitioner,

V.

Charles Condon, Attorney General for the State of South Carolina
Respondent.

On Writ Of Certiorari To The Court Of Appeals To The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the AEDPA time bar Constitutional claims when the trial court errs in consolidating two independent cases for one trial and when the trial court did not gain subject matter jurisdiction because of the State's failure to make a formal motion for consolidation in violation of Appellant's due process and equal protection rights under the Constitution and its' Amendments?
2. Was trial counsel ineffective for not making a motion to sever the two independent cases?
3. Was trial counsel ineffective for not knowing or understanding the rules concerning the reasonable doubt and circumstantial evidence charges?
4. Was trial counsel ineffective for not demanding a special instruction (such as a limited instruction) to use only the evidence to that case and not to use the evidence cumulatively?
5. Was trial counsel ineffective for not knowing or fully understanding the giving of the "Allen" charge at trial or in the 4th Circuit?
6. Was trial counsel ineffective for not understanding the Alford plea?
7. Was direct review counsel ineffective for not appealing the issue of consolidation to the Supreme Court of South Carolina?
8. Was direct review counsel ineffective for not appealing the reasonable doubt and circumstantial evidence instruction to the Supreme Court of South Carolina?
9. Was direct review counsel ineffective for not fully developing the argument of the giving of the "Allen" charge to the Supreme Court of South Carolina?
10. Did the inexperience of trial and direct review counsel attribute to the prejudice suffered to the Appellant by counsel?

11. Was the Post Conviction Relief (PCR) counsel ineffective for not raising the issue of consolidation?
12. Did Post Conviction Relief Judge err in its ruling on the issue of consolidation while on Remand from The Supreme Court of South Carolina?
13. Did Post Conviction Relief Judge err in its rulings on reasonable doubt and circumstantial evidence charges coupled with the issue of consolidation?
14. Did the jury use the evidence of both cases cumulatively to find the Appellant guilty of one case undermining the jury's verdict?
15. Did the Supreme Court of South Carolina err in its Remittitur without adjudicating the issues on the merits and is The Supreme Court of South Carolina adjudicating all its' cases the same on the issue of consolidation?

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OPINIONS BELOW

Appellant is seeking review of the United States Court of Appeals for the Fourth Circuit, the United States District Court of South Carolina and the Supreme Court of South Carolina.

JURISIDICTIONAL STATEMENT

This Court has jurisdiction of Appellant's case from the United States Court of Appeals for the Fourth Circuit and the United States District Court of South Carolina AEDPA's time barred decision. The failure of these Courts and the failure of the Supreme Court of South Carolina to adjudicate the Constitutional claims of Appellant's right to a fair trial, due process violations, effective assistance of counsel (both trial and appellate) and violation of the Federal Rules of Criminal Procedure 8(a), affords this Court with the task of providing the proper analysis required for adjudication of Appellant's case.

The PCR judge, (while case was on Remand) stated the claims were without merit.

PROCEDURAL HISTORY

Appellant was arrested on February 16th, 1982 for an alleged crime committed that day. The arrest was reported in various newspapers, including The News and Courier on February 18th, 1982, with the details of the alleged crime. On February 19th, 1982, Appellant was arrested for an alleged crime that was similar to the previous alleged crime that had occurred on February 12th, 1981. The alleged victim reported this incident after reading the newspaper article and she testified the article prompted her memory of the earlier incident.

Appellant was indicted during the May 10th, 1982 term of court by the Berkeley County Grand Jury on two separate incidents, one occurring on February 16th, 1982 and the other incident was on February 12th, 1982 (according to the indictments, actual date should have read February 12th, 1981). Charges consisted of (2) counts of Kidnapping, (2) counts of Criminal Sexual Conduct 1st Degree and Assault With a Deadly Weapon.

The Berkeley County Grand Jury re-indicted the Appellant at the November 1st, 1982 term for Kidnapping and Aggravated Assault and Battery for the February 16th, 1982 alleged incident, (existing indictment was for Kidnapping and Criminal Sexual Conduct 1st Degree) changing the initial indictment or deleting it in its' entirety. The State amended the other two indictments the day of trial, before the swearing in of the jury, deleting a portion of one charge and correcting the dates on both, to state the year as 1981 instead of 1982.

The Appellant points out these mistakes to show that there was a problem with the dates from the very beginning, indictment stage and trial stage.

Appellant was tried during the November 1982 term of the Berkeley County Court of General Sessions before the Honorable James M. Morris and a jury. Appellants' direct review counsel (same as trial counsel) filed an appeal to the Supreme Court of South Carolina on April 13th, 1983 and

was denied on November 30th, 1983. Appellant retained counsel to file an Application for Post Conviction Relief (APCR) on June 18th, 1996. An evidentiary hearing was held on July 22nd, 1998 and denied on October 22nd, 1998. Appellant filed a *pro se* Motion to Alter or Amend a Judgment and a Change of Attorney dated November 11th, 1998 and a Motion for Relief From Judgment dated January 21st, 1999.

POST PCR BACKGROUND

At the time Appellant received the PCR Orders from the Court, he was at the Broad River Correctional Institution (BRCI). Law library access was very limited as to the times it was available due to Appellant leaving the institution for work and returning for a one hour time slot at night in which the library was open for research and copies of cases to be contrasted and they were received the next day or later.

While awaiting for the Court to respond to these motions, Appellant asked his father, James P. Brogdon, Jr. and Appellants' wife, Selena F. Brogdon to go to the Berkeley County Courthouse to check the status of his case and to see if the motions were contained in his file. Upon their inspection, it was found to contain other people's paperwork and didn't contain any of his *pro se* motions that he had filed.

After receiving no response from all his *pro se* motions, Appellant filed a Motion for Relief from Judgment or Order, dated January 21st, 1999 and included copies of the previous *pro se* motions. Appellant relied in part on Rule 60 (b)(1), SCRCP, arguing that any delay in filing his post-trial motion was excusable under that Rule.

Rule 59(b) states that a motion to alter or amend a civil judgment must be filed ten days from receipt of written notice of the order. Rule 60(b)(1) relaxes the ten day time limit where the movant is not at fault for the delay. Where a case is on appeal, Rule 60 requires leave from the appellate court to file a motion there under. Rule 60(b)(1)states in part:

"On motion and upon such terms as are just, the

court may relieve a party.. From a ..final judgment, order, or proceeding for the following reasons (1) mistake, inadvertence, surprise or excusable neglect; The motion shall be made within a reasonable time.. Not more than one year after the.. order ..was entered..."

Appellant believes he satisfied the requirements of this Rule to have the new grounds heard by the PCR court and be included in his Application for Post Conviction Relief (APCR) because he mistakenly missed the grounds which were presented as meritorious claims because of the Constitutional violations.

Appellant felt that judicial economy would be best served by fully addressing all of Appellant's trial claims before the commencement of his appeal. Appellant's delay in filing the first motion was not protracted (ten days) and was totally inadvertent.

Assistant Appellate Defender, Aileen P. Claire, a government employee, (she is paid by the state of South Carolina and is the only counsel Appellant has not paid) filed a Motion for Leave to file a Motion to Alter or Amend Judgment, pursuant to Rules 59 and 60 SCRCP, dated March 25, 1999. Leave was denied but Remanded to rule on the motion. The PCR Judge denied the motion on June 28th, 1998.

Assistant Appellate counsel filed a Writ of Certiorari to The Supreme Court of South Carolina on November 19th, 1999 and it was denied by Remittitur on February 9th, 2001. On February 7th, 2002, Appellant originally filed a Writ of Habeas Corpus in Charleston and was told he did not need to pay his filing fee until after review from the Magistrate Judge and would be notified if it was in proper form and a copy could be served on the Attorney General at that time.

On August 28th, 2002, Appellant called the Clerk of Court and found out that the case had been decided and finalized, inquiring as to why Appellant was not notified, the

clerk asked if I still lived in Hardeeville, S.C.? Appellant replied, "I have never lived in Hardeeville" and she asked for my address. Appellant received Judge Houck's Order on August 29th, 2002. Appellant wrote a letter to Judge Houck for a copy of the Magistrate Judge's Order to see why the petition was not in proper form.

Around November 1st, 2002, Appellate was told the judge would not read a letter and it had to be in motion form. A motion was prepared and mailed to Judge Houck in Columbia, South Carolina and Appellant waited patiently with no response. On January 27th, 2003, Appellant called the clerk of court and was told his address was still being shown in Hardeeville and nothing was in the files about the motion.

On January 30th, 2003, Appellant paid the $5.00 filing fee and filed a Motion to Reopen his case and no ruling was made on that Motion; however, the filing of another Motion to Reopen in September 2004, and was granted by The United States Magistrate Judge Bristow Marchant on September 29th, 2004.

Appellate then filed a brief to the United States District Court, District of South Carolina. On October 7th, 2005, the court was constrained to deny due to AEDPA's one-year timeline to file on January 24th, 2006. Appellate filed a brief to the United States Court of Appeals, Fourth Circuit on March 10th, 2006 and was denied Certificate of Appealabilty on May 31st, 2006 and a Mandate was filed on June 22, 2006.

CONSOLIDATION ARGUMENT

The South Carolina Rules of Criminal Procedure Rule 4 - Motions in General states in Annotations Rule 4 :

> "Joinder is proper if the offenses 1) are of the same general nature or character and spring from the same series of transactions, 2) are committed by the same offender, and 3) require the same or similar proof. **State v. Carter**, ___SC___ 478 S.E.2d 86, 88 (Ct. App. 1996)"

Appellant claims and will show the trial court, prosecution and defense counsel failed to afford the defendant his right to a fair trial protected by the South Carolina Constitution, the 5th and 6th Amendments to the United States Constitution, the Federal Criminal Rules of Procedure 8(a) and his 14th Amendments rights to due process and equal protection of law have been violated by the improper joinder/consolidation of charges adjudicated in the General Sessions of Berkeley County on November 9th, 1982.

Appellant was tried for two unrelated incidents that took place more than a year apart. The behavior alleged in each case was similar. However, the evidence was disparate, as shown by jury's ultimate acquittal on the 1981 charge.

Appellant claims prosecuting these two cases before the same trial court and the same jury was fundamentally unfair, contrary to all constitutional safeguards and precedent case law, creating insurmountable and unavoidable prejudice to the Appellant. Not even meticulous instructions to the jury from start to finish could have cured the prejudice, even if the trial court had made an attempt at a limiting instruction concerning joinder/consolidation of the cases. Appellant claims, no where in the record or transcripts, was there ever a statement to the jury, this was two separate and distinct cases on trial and to only use the evidence independently for their' respective case.

Appellant asserts even where a single transaction is on trial and evidence from other similar crimes is allowed to be

admitted under the **Lyle** rule, which did not occur in this case, the South Carolina Supreme Court noted in **State v. Timmons**, 488 S.E.2d. 323 that:

> "On the merits, the general rule is that when evidence of other crimes is admitted for a specific purpose, the judge is required to instruct the jury to limit their consideration of this evidence for the particular purpose for which it is offered. **See State v. Steadman**, 216 S.C. 579, 59 S.E.2d. 168 (1950)."

Criminal charges are properly joined only when they arise from the same transactions and are provable by the same evidence. **State v. Avery**, 333 S.C. 284, 509 S.E.2d 476 (1988); **State v. Middleton**, 288 S.C. 21, 339 S.E.2d 692 (1988). Even if charges are similar in nature, they should not be tried together unless they arise from the same circumstances and involve the same evidence; otherwise, the presentation of unrelated evidence violates **State v. Lyle**, 125 S.C. 406, 118 S.E. 803 (1923). **State v. Tate**, 286 S.C. 462, 334 S.E.2d 289 (1985). The fundamental rules controlling joinder were well-developed long before Appellant's trial. **See, e.g., City of Greenville v. Chapman**, 210 S.C. 157, 41 S.E.2d 865 (1947).

If Appellant had been tried separately on each charge, evidence regarding the other incident would have violated **Lyle, supra.** The charges were improperly joined because they did not arise from the same chain of circumstances or involve the same evidence.

The Court of Appeals of South Carolina held in **State v. Jones**, 479 S.E.2d. 517 (S.C. App. 1996):

> "The propriety of consolidating charges for trial has recently reiterated in **State v. Smith**, ___ S.C.___, 470 S.E.2d. 364 (1996):Where the offenses charged in separate indictments are of the same general nature involving connected transactions closely related in kind, place and character, the trial judge has the

power, in his discretion, to order the indictments tried together if the defendant's substantive rights would not be prejudiced. **State v. Sullivan**, 277 S.C. 35, 282 S.E.2d. 838 (1981); **State v. Williams**, 263 S.C. 290, 210 S.E.2d. 298 (1974); **McCrary v. State**, 249 S.C. 14, 152 S.E.2d. 235 (1969)[(1967)]. Id. at ____, 470 S.E.2d. 365. Offenses are considered to be of the same general nature where they are interconnected. **State v. Harry**, ___ S.C.___, 468 S.E.2d. 76 (Ct. App. 1996).

Conversely, offenses which are of the same general nature, but do not arise out of a single chain of circumstances and are not provable by the same evidence may not properly be tried together. **See e. g. State v. Middleton**, 288 S.C. 21, 339 S.E.2d. 692 (1986) (holding although prison escapee committed two murders within a few miles of each other and attempted an armed robbery, the trial judge erred in consolidating the charges for one trial where the crimes did not arise out of a single chain of circumstances and they required different evidence), cert. denied, 488 U.S. 872, 109 S. Ct. 189, 102 L.Ed.2d. 158 (1988); **State v. Tate**, 286 S.C.462, 334S.E.2d. 289 (Ct. App.1985)(holding joint trial on identical but unrelated forgeries violated defendant's right to a fair trial)."**Id at 519**.

The Court of Appeals of South Carolina in **State v. Tate, Supra**:

> "...held that: (1) joinder of offenses in one indictment and trial was improper; (2) offenses did not arise out of a single chain of circumstances; (3) offenses were not provable same evidence; and (4) joinder would be prejudicial. Reversed and remanded...offenses did not arise out of a single chain of circumstances so as to satisfy joinder of charges in indictment, where they were not in substance a single course of conduct or connected transactions...offenses were not provable by the same evidence, for purposes of joining offenses

in one indictment and trying them together, where charges were supported by testimony of different witnesses... Joinder of two...charges in one indictment and trial would be prejudicial, where it was likely jury would infer criminal disposition based on evidence of one (offense) and on that basis alone find defendant guilty of another (offense) in that (offenses) were similar... **City of Greenville v. Chapman**, 210 S.C.157, 41 S.E.2d 865,867(1947) ... **See Drew v. United States**, 331 F.2d 85,89-90 (4th Cir. 1964)." **Id. at 289-290.**

The Supreme Court of South Carolina held in **State v. Middleton, Supra**:

"Applicant's first contention is the trial judge erred in consolidating the charges for trial. We agree. Middleton escaped from a prison work detail near Goose Creek on June 8th, 1984. According to the charges, he raped and murdered Janell Gardner on June 9th, and Shirley Mae Mack on June 10th. The victims were asphyxiated, and their bodies were mutilated... The State argues consolidation was justified, alleging all the crimes were part of a crime spree. **See State v. Woomer**, 276 S.C. 258,277 S.E.2d. 696 (1981). In support of this contention, the State notes the similarity of the murders, and the fact the crimes were committed within a radius of a few miles. The State also contends the same knife was used in the crimes. However, this case clearly fails to meet the requirements for consolidation. The crimes did not arise out of a single chain of circumstances, and required different proof. Furthermore, the prejudice is apparent. **See State v. Tate, (supra)**, citing **City of Greenville v. Chapman ,(supra)**. It is evident the charges did not arise out of the same transaction. **State v. Whitner**,238 S.C.244, 89 S.E.2d. 701 (1955)." **Id at 693**.

Appellant's acquittal on the 1981 charge did not mitigate the prejudice he suffered by the presentation of irrelevant evidence. Even though he was acquitted of the 1981 offense, the entire body of evidence of that charge was presented to the jury and that evidence had no place in the trial of the alleged 1982 case and should have been withheld. Appellant claims this undermines the reliability of the jury's verdict and leaves more than a reasonable doubt as to how the decision was reached, by how and what evidence was used. It could be the jury used the evidence cumulatively in reaching its' verdict, using some evidence from each alleged crime.

Appellant asserts his due process and equal protection rights, as guaranteed by the 14th Amendment, were violated by the trial court for failing to address the inherent prejudice to the defendant to defend himself against two unrelated cases at the same time. When the State brings multiple indictments to the trial court and it is apparent that they arise out of separate transactions, this is tantamount to a formal motion for consolidation by the State. It is the legal responsibility of the trial court to address this issue by directing the State to proceed on just one case only, in order for the trial court to gain subject matter jurisdiction.

By state and federal rule as noted in **State v. Whitner, Supra**:

> "The rule in this state is that distinct offenses - felonies or misdemeanors - may be charged in separate counts of the same indictment, whether growing out of the same transaction or not. If the several offenses charged do not grow out of the same transaction, then the proper practice is to require the prosecuting officer to elect upon which count he will proceed." **Id at 711**.

Consequently, if the charges are in several indictments and do not grow out of the same transaction, then it is the responsibility of the trial court to require the State to elect upon which case he will prosecute.

The trial judge swore in the jury, with the following statement:

> "Now you have previously been advised that the State has indicted Gary P. Brogdon for kidnapping, criminal sexual conduct, aggrevated [sic] assault and battery and assault with a deadly weapon. And the charges, of course are based upon three indictments which the Solicitor will either read or explain to you in his opening statement. "

By this statement to the jury, Appellant claims the jury was lead to believe he was being tried for one case, instead of two separate and distinct cases. The trial judge left it to the Solicitor to inform the jury of the two cases and the Solicitor did not inform the jury the cases were separate cases and they had to keep the evidence separate. The jury did not read nor did they have the indictments in hand until they began deliberations. The prosecution lined up their' witnesses with the alleged victim in the 1982 incident being first, with the supporting witnesses of that case and all the circumstantial evidence, followed by the alleged victim of the 1981 incident with supporting witnesses of that case and all the circumstantial evidence. This would appear to be as support from one incident to the other incident and further promote the evidence to be used cumulatively from the view point of the jury.

At the close of trial, after deliberations began and after suggestion by the trial judge, the trial judge allowed the replaying of the alleged victims' testimony of the 1982 incident. It was only of the alleged incident and without any cross-examination. This acted as to bolster the alleged victims' testimony and further promote the prejudice suffered by the Appellant in an already unconstitutional, highly prejudicial and unfair trial. The trial judge should not have suggested to the jury or allowed the replaying of this testimony since, it acted as to bolster the alleged victims' testimony and that incident at this point.

INEFFECTIVE ASSISTANCE OF TRIAL, DIRECT REVIEW AND PCR COUNSEL ARGUMENT

Appellant will group these claims together as they all deal with the ineffective assistance of counsel (trial, direct review and PCR) claim.

The Appellant was denied effective assistance of counsel in violation of South Carolina law and the 6th and 14th Amendments to the United States Constitution, as a result of defense counsel's failure to object to the trial court's 'de facto' consolidation of two separate and distinct alleged transactions before one jury.

Although not all of defense counsel's errors constitute ineffective assistance of counsel, when those errors are contrary to sound trial strategy and those specific acts or omissions are so unreasonable to allow the accused to be subjected to unavoidable prejudice, the accused deserves relief as established by **Strickland v. Washington**. It could only be the very rarest of cases that a defense counsel would believe it would be best to allow two similar, but unconnected cases, be tried at the same time, and the possibility of the jury using the evidence cumulatively looms large. Appellant claims, if this was trial counsel's trial strategy, it was so ill chosen that it permeated the entire trial with obvious unfairness.

Appellant's rights to a fair and just trial under his guaranteed rights were disregarded by all officers of the court. First, by the State, by not making a formal motion to consolidate these two distinct and separate cases before the trial judge. Secondly, by the trial judges' failure to require the State to elect on which incident they were going to proceed to trial on in order to gain subject matter jurisdiction. Thirdly, by defense counsel for not raising an objection to the improper joinder/consolidation of these cases.

The errors by defense counsel not limited to, but in the very least and causing the most damage are as listed below:

1). For failing to know the laws and rules governing

joinder/consolidation of cases.

2). For failing to know the inherit prejudice from the improper joinder of two unrelated and distinct cases.

3). For failing to object to the consolidation of the cases.

4). Since neither of these two happened, at least demand the court give an opening and closing instruction to the jury to limit the use of the evidence to their' respective cases. In which, the Appellant does not in any way think an instruction would ever cure the prejudice suffered by improper consolidation.

5). Failure to request proper jury instructions on reasonable doubt and circumstantial evidence charges.

6). For not understanding the laws and rules concerning the giving of the "Allen" charge.

7). For not understanding the plea bargaining process.

The errors by direct review counsel in the very least are as listed below:

1). Failure to articulate an argument concerning the improper joinder/consolidation of two unrelated and distinct cases and not knowing the rules and laws governing the joinder/consolidation of two cases for one trial.

2). Failure to research the argument concerning the "Allen" charge to its' fullest.

3). Failure to articulate an argument on proper jury instructions concerning reasonable doubt and circumstantial evidence and some kind of (limiting) instructions concerning the use of the evidence to their' respective case.

In the case at hand, Appellant refers to **Drew v. United States**, 331 F2d. 85, quoting Circuit Judge McGowan:

"If separate crimes are to be tried together- and we are not to be understood as intimating any conclusion that this can never, as a practical matter, be successfully

undertaken- both court and counsel must recognize that they are assuming a difficult task the performance of which calls for a vigilant precision in speech and action far beyond that required in the ordinary trial."

Appellant claims the court and defense counsel assumed the difficult task which called for a precision in speech and action far beyond that required of an ordinary trial. With the jury believing this is one case, not two separate cases and having to keep the evidence separate, the ineffective assistance of counsel, and problematic jury instructions with the highly coercive **Allen** charge, this was far from an ordinary trial. Appellant has paid for their' imprecision through the unconstitutional, fundamentally unfair and unjust trial creating insurmountable and unavoidable prejudice to the Appellant.

The trial court gave the jury the following instruction on reasonable doubt:

> "Now what is reasonable doubt? It is not an imaginery [sic] or a fanciful or a weak doubt, rather it is a dobut [sic] which the words implie [sic], a doubt for which you can give a reason. If you have a doubt for which you can give a reason as to the guilt of the defendant, then he would be entitled to a verdict of not guilty. Reasonable doubt may arise from the evidence which is in the case or from the absence or lack of evidence."

The court gave the following instruction on circumstantial evidence:

> "Circumstantial evidence is permissible [sic] provided it meets the legal test to the extent that the state relies on the circumstantial evidence, it must prove all the circumstances relied on beyond a reasonable doubt. They must be wholly and in every particular perfectly consistent with one another and they must point conclusively, that is to a moral certainty, to the guilt of the accused to the exclusion of every other

reasonable hypothesis. In other words, the circumstances must be absolutely inconsistent with any other reasonable hypothesis than the guilt of the accused. In the consideration of circumstantial evidence, you must seek some reasonable explanation thereof other than the guilt of the accused and if such reasonable explanation can be found, you cannot convict on such evidence."

The jury began deliberating at 4:09 p.m. on the afternoon of the 3rd day of trial. At 10:24 p.m., the jury requested an additional instruction on reasonable doubt. The court issued the following charge:

> "Al right. Reasonable doubt, it is not an imaginery [sic] or a fanciful doubt or a weak doubt, rather it is a doubt which the words imply, a doubt for which you can give a reason. If you have a doubt for which you can give a reason as to the guilt of the defendant, then he would be entitled to a verdict of not guilty."

Failure to request proper jury instructions constitutes ineffective assistance of counsel **Battle v. State**, 305 S.C. 460, 409 S.E.2d 400 (1991). A jury instruction is defective if a reasonable juror could interpret it to permit a finding of guilt based on a degree of proof less than that required by due process. **State v. Manning,** 305 S.C.413, 409 S.E.2d 372 (1991); **See also Victor v. Nebraska,** 511 U.S. 1, 114 S. Ct. 1239 (1994); **Cage v. Louisiana,** 498 U.S.39, 111 S. Ct. 328 (1990); **Adams v. Aiken,** F.2d 1306 (4th Cir. 1992).

In **Manning,** the following instruction was invalidated:

> "Beyond a reasonable doubt, in telling you that, that is the degree of proof by which the State must prove, that phrase means exactly what it states in the English language, and that is a doubt for which you can give a real reason. That excludes a whimsical doubt, fanciful doubt. You could doubt any proposition if you wanted to. A reasonable doubt is a substantial doubt for which honest people, such as you, when searching for

the truth can give a real reason. So it's to that degree of proof that the State is required to establish the element of the charge."

The court found that the "moral certainty" language was defective because it allowed the jury to base its decision of a subjective rather than evidentiary considerations. It found that the "real reason" language was not prejudicial in itself. However, combined with the remainder of the jury charge, it had the effect of diluting the state's burden. **Id.**

The jury charge in Appellant's case, as in **Manning,** diluted the state's burden of proof in violation of the Due Process Clause. In fact, Appellant's faulty instructions are virtually identical to those condemned in **Manning.** The prejudice to Appellant was compounded when the judge reissued the defective reasonable doubt charge. The jury deliberated fruitlessly for more than six hours before requesting the second instruction. It deliberated for another two and a half hours after receiving the second defective charge.

The trial court issued unconstitutional instructions on reasonable doubt and circumstantial evidence. When these two instructions are coupled together, a reasonable juror could have equated reasonable doubt with moral certainty because of the wording in the circumstantial evidence instruction and the reasonable doubt instruction. "Moral certainty" cannot be sequestered from its' surroundings and the term moral certainty, standing alone might not be recognized by modern jurors as a synonym for proof beyond a reasonable doubt. **Id. at 1157** "Although **Nutter** concedes that **Cage** announced a new rule, he contends that it falls within the second **Teague** exception which encompasses rules that are central to an accurate determination of innocence or guilt." **Teague**, 489 U.S. at 319, 109 S. Ct. at 1080. Under this exception, federal courts may retroactively apply new rules of law on collateral review in cases involving 'watershed rules of criminal procedure' implicating the

fundamental fairness and accuracy of the criminal proceeding. **Graham v. Collins**, -U.S.-, -, 113 S. Ct. 892, 903, 122 L. Ed.2d. 260 (1993). To fall within the exception, the new rule must satisfy a two pronged test: (1) it must relate to the accuracy of the conviction and (2) it must alter our' understanding of the bedrock procedural elements to the [fundamental] fairness of a proceeding. **Sawyer v. Smith**, 497 U.S. 227, 242 110 S. Ct. 2822, 2831, 11 L. Ed. 2d. 193 (1990). The courts have held that, in criminal cases relying in whole or in part on circumstantial evidence, once a proper reasonable doubt instruction is given, jury should be instructed the law makes absolutely no distinction between weight or value to be given to either direct or circumstantial evidence nor is greater the degree of certainty required after weighing, if not convinced of the guilt of the defendant beyond a reasonable doubt, it must find defendant not guilty. **See State v. Grippon**, 489 S.E.2d. 462 (1987); **State v. Adock**, 310 S.E.2d. 587 (1984) (No reasonable hypothesis instruction required when correct reasonable doubt instruction given). **See also Holland v. United States**, 348 U.S. 121, 75 S. Ct. 127 (1954). In **Holland**, the court held that if proper reasonable doubt instruction is given, a jury need not be instructed that circumstantial evidence be so strong as to exclude every reasonable hypothesis other than guilt. **United States v. Russell**, 971 F.2d. 1098 (4th Cir. 1992), **cert. denied**, 506 U.S. 1066, 113 S. Ct. 1013 (1993).

The trial court then issued a highly coercive **Allen** charge after the trial judge initiated inquiry as to how the jury stood and if, there was any progress being made on reaching any verdicts. This charge was erroneous and was prejudicially coercive and volatile at the time given. By the time of the Appellant's trial, the case law was well settled concerning the giving of the Allen charge in this circuit. **See United States v. Sawyers**, 423 F2d. 1335 (4th Cir. 1970). **Brasfield v. United States**, 272 U. S. 448, 47 S. Ct. 135 (1926) The court held, giving the Allen charge after inquiry by the court as to

the extent of the jury's division was coercive; **Green v. United States**, 309 F. 2d. 872, 855 (5th Cir 1962). The court held, "Charge stating it is the minority's duty to listen to the majority with distrust of their own judgment, since majority will have better judgment than the minority, exceeded permissible limits."

An examination of the record shows the trial court emphasizing the minority should give up their conscientious decision to the majority. The trial court, in response to the jury's note, delivered its' supplemental charge and its appropriateness must be judged in relation to the note, which only requested a reasonable doubt charge. Deliberations continued until 1:00 a.m., when the jury returned with its' verdicts.

In his application for PCR, Appellant claimed that these instructions were unconstitutional, and unduly highly coercive at the time given and trial counsel was ineffective for not objecting to them. The lower court found that counsel was not ineffective. This ruling was error.

Trial counsel's failure to advise Appellant regarding a plea under **North Carolina v. Alford**, 400 U.S. 25, 91 S. Ct.160 (1970) explaining that he would be subjected to so much unavoidable prejudice in this trial due to it being a consolidated trial was also ineffective assistance of counsel.

Appellant claims trial, direct review and PCR counsel was ineffective by not knowing the laws concerning the improper joinder/consolidation of two distinct and separate cases for one trial using the two-pronged **Strickland** test. The first prong is to show that both counsels' actions "fell below an objective standard of reasonableness" by not knowing the laws and rules of South Carolina, concerning joinder or consolidation and the second prong is the inherit prejudice that occurs when allowing two distinct but similar cases being tried together. The laws and rules governing the joinder/consolidation were well-established before trial. Direct review counsel failed to articulate an argument

concerning the improper consolidation of these two cases.

In order to establish a claim that appellate counsel was ineffective for failing to pursue a claim on direct appeal, the applicant must normally demonstrate (1) that his "counsel's representation fell below an objective standard of reasonableness" in light of the professional norms, **Strickland,** and that " there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," **Id** at 694.

> "Notwithstanding Barnes, [**Jones v. Barnes**, 463 U.S. 745,752 (1983)], it is still possible to bring a Strickland claim based on counsel's failure to raise a particular claim" on direct appeal, the Supreme Court has recently reiterated that "it [will be] difficult to demonstrate that counsel was incompetent." Robbins, 120 S.Ct. at 765. Generally, only when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." **Id.** (quoting **Gray v. Greer**, 800 F.2d 644,646 (7th Cir. 1986).

Appellant claims if, direct review counsel had articulated an argument concerning this improperly consolidated case before the Supreme Court of South Carolina, the decision of the Court would have had no choice but to overturn the conviction by the decisions that have been decided by the Court concerning this issue. Reviewing the precedent cases and all cases reviewed by the Supreme Court of South Carolina concerning consolidation, it is apparent the Court has not wavered in its' rulings against consolidation of cases that do not fit the requirements of consolidation. At least in those cases presented to the Supreme Court of South Carolina, the State made a formal motion for consolidation and the trial judge ruled on that issue and trial counsel at least made an attempt to sever the cases showing Appellant's defense counsel fell below an objective standard of reasonableness and it could have been the result of counsel's

inexperience. Direct review and PCR counsel may fit this same conclusion. Appellant feels, if direct review counsel had known, then trial counsel would have known because they were the same counsel and defense counsel would have objected during the trial. Appellant's case does not fit the guidelines and requirements established in South Carolina for consolidation of cases for one trial.

Appellant points out number 3 in **Strickland v. Washington:**

> "The standards do not establish mechanical rules; the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." Pp. 696-698

The fundamentally fairness of trial was thrown to the side in Appellants' case by all officers of the trial, PCR and The Supreme Court of South Carolina and The United District Court of South Carolina and The Fourth Circuit Court of Appeals by the failure to rule on the ineffective assistance of counsel claim and Constitutional claims made by Appellant.

Appellant has tried every way possible to get any and all courts in the State and Federal level to review his claim of ineffective assistance of trial counsel, counsel for direct review and PCR counsel. The Appellate Defense Counsel filed Appellant's Motion for Leave from the Supreme Court of South Carolina and the Writ of Certiorari in the Supreme Court of South Carolina. After the Remittitur from the Supreme Court of South Carolina, she advised Appellant there was a one year deadline, from that date, to submit a Writ of Habeas Corpus concerning these matters. Appellant believes he satisfied the spirit of the Rules, so that he could consolidate all the issues for Federal Habeas Corpus review and should not have been procedural barred from their submissions on the facts. Appellant has diligently tried to submit his claims as set forth in our laws governing these states to the best of his ability and should be heard and issues adjudicated instead of summarily dismissed or time barred.

CONSOLIDATION ON REMAND TO PCR JUDGE ARGUMENT

Appellant's counsel, while Appellant filed and was waiting on the PCR court to rule on the Rule 59 motion, filed a "Notice of Intent to Appeal" to The Supreme Court of South Carolina. Counsel then notified the Appellate Defense of South Carolina to his actions, the filing of the intent to appeal.

The Appellant, then filed a Rule 60 (b)(1) motion to the PCR court not knowing Leave was required from The South Carolina Supreme Court in order to file this motion, until after talking to the Appellate Defense counsel, in which she applied for Leave and Leave was denied but Remanded to the lower court. Appellant then filed his *pro se* Rule 60 motion to the lower court and included his previous *pro se* motions, so that he could consolidate all his issues, before commencement of the Supreme Court Appeal and all the issues could be considered.

As noted, in the Rule 60 motion, Appellant could have raised it in a Habeas Corpus action, but had to exhaust all state remedies first.

The PCR judge erred in its' ruling on the issue of consolidation while on Remand from The Supreme Court of South Carolina in not considering the Constitutional claim. The PCR Judge claims:

> "The motion, however, was not filed with the court. The petitioner's failure to file the motion is evidenced by the lack of any date stamp upon the motion. Thus, the petitioner's motion is untimely.
> Even if the petitioner's motion to alter or amend had been timely filed, the court concludes that it is without merit. Accordingly, the court denies the motion on this alternative basis." (PCR Order on remand)(also see attached Affidavit)

Appellant refers to the previous pages of this brief in order of not being redundant.

HOW DID THE JURY USE ALL THE EVIDENCE PRESENTED ARGUMENT

All the trial judge charges to the jury and every time anything was said in the courtroom, in the presence of the jury, was in the singular form "the case" not separate cases. This along with the statements throughout this brief leads to the one question of how the jury reached its' verdict? The answer is no one knows how the jury reached its' verdict because they could of used the evidence cumulatively, since the trial judge stated it didn't matter from what witness's testimony they believed to arrive at their' decision. The jury could have used a little testimony from each witness to reach its' verdict or could have finally bargained that the defendant had to do something or he would not have been charged with so many crimes, so let's find him guilty of something. There is more than a reasonable doubt they used only the evidence of the one case in reaching their verdict.

Again the Appellant points to **Strickland,** 2(b) in part:

> "A reasonable probability is a probability sufficient to undermine confidence in the outcome. A court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." Pp.691-696

The totality of the evidence is in focus and the questions in Appellants' briefs throughout this process. The evidence of two unrelated, but similar cases was tried together in an unconstitutional, highly prejudicial trial. This trial was far from ordinary and the end result was a miscarriage of justice.

All of this coupled with the fact the jury asked "What is reasonable doubt?" after more than six hours of deliberations and was given the same problematic charge and was given the highly coercive **Allen** charge. This was after the trial judge inquired as to how the jury stood on reaching their verdict.

SUPREME COURT OF SOUTH CAROLINA ERRED

ARGUMENT

The Supreme Court of South Carolina erred in its Remittitur by not adjudicating the Constitutional issues on the merits.

Reviewing the cases, the Court has decided on this issue, it has not wavered on its' precedent cases or any case that has not fit the rules of consolidation. If the cases did not arise out of a single chain of circumstances and required different proof, it has reversed the lower courts decision in every published opinion. The cases listed in this brief, show that The Supreme Court of South Carolina has failed to adjudicate the issue of consolidation equally and fairly to the Appellant and affording the Appellant the same fair adjudication on the merits as all other cases presented to The Appeal Courts of South Carolina concerning this issue.

Appellant believes the consolidation issue stands alone in having the Court (State or Federal), adjudicate the issue on the merits with the ineffective assistance of counsel, to have the conviction overturned and barred for retrial for the States' failure to follow their' own rules from the very beginning. Appellants' appeals have not been adjudicated by the same rules as all the other cases in South Carolina. Couple this issue with a problematic reasonable doubt and circumstantial evidence charge (as in the Order of the PCR judge stating the two charges were problematic), surely, should be enough to have the conviction overturned. Since all the evidence of both cases was circumstantial and the instructions lessened the States' burden of proof because of all the evidence, that was admitted, did not pertain just to one case, but to two independent and distinct cases.

As further noted in the ineffective of assistance argument of this brief, if direct review counsel had articulated an argument on this issue the court would have overturned the conviction by their precedent cases on consolidation.

CONCLUSION

In conclusion, Appellant claims and has shown the trial court, prosecution and defense counsel failed to afford the defendant his right to a fair trial protected by the South Carolina Constitution, the 5th and 6th Amendments to the United States Constitution, the Federal Criminal Rules of Procedure 8(a) and his 14th Amendments rights to due process and equal protection of law have been violated by the improper joinder/consolidation of charges adjudicated in the General Sessions of Berkeley County on November 9th, 1982.

The trial court failed to gain jurisdiction by the States' failure of making a formal motion of consolidation of the two independent cases for one trial. Trial judge failed to require the state to elect on which case prosecution was to proceed on to trial. Defense counsel failed to make a motion to sever the two cases for independent trials.

Ineffective assistance of trial, direct review, PCR and appellate defense counsel has further promoted the prejudice suffered by the Appellant by the inexperience or the fact all of Appellants' counsels just did not know the rules, laws and procedures they should have known in representation of Appellate. These show that counsel's representation fell below an objective standard of reasonableness and counsels should have investigated the issues of Appellants' case. Each step of Appellants appeal process gets more stringent as each appeal is denied. Appellant being *pro se* is less qualified to argue an appeal, but from the very outset of trial, this has been a serious miscarriage of justice, due to the ineffective assistance of counsel and by the lack of any state court to adjudicate the issues raised on its' merits.

PCR judge erred by failing to adjudicate all the issues in Appellants' case. The totality of the issues; consolidation, ineffective assistance of counsel and problematic jury instructions in reaching his decision. The Supreme Court of South Carolina has also failed to adjudicate the issues on the merits further prejudicing the Appellant to receive a fair trial

or hearing on the issues. This is a Constitutional claim and failure of the State to adjudicate these issues warrants judicial review by this Court.

Appellant can not prove how the jury used all the evidence that was presented to them during trial, but it would have been a very difficult task to keep the cases separate from each other even if, the judge would have allowed the taking of notes. Even in the latest brief's to the United States District Court of South Carolina in their' Report and Recommendations' by United States Magistrate Judge Bristow Marchant in the procedural history portion the dates as to the alleged incidents are incorrect. It is possible to consider that these mistakes are typographical errors but, it could also be, the cases are so confusing together that people find it hard to keep each case separate from the other while having the dates in front of them on paper (as the Court, the State and the Appellant does now) and the jury had no such luxury of having any way to keep the cases separated during trial and the jury was not instructed to keep the evidence separate.

With problematic jury instructions and after hours of jury deliberations, the jury trying to remember who said what, had to decide what they thought was "the case" and by being coerced into a decision by the judge after another problematic instruction on reasonable doubt and by the highly coercive prejudicial **Allen** charge. One can only wonder what was going on in the jury room. It could be the replaying of the alleged victims testimony at the end of trial and more hours of deliberations. Some (jurors) may have gave into the majority's opinion.

The Supreme Court of South Carolina erred in its' Remittitur by not adjudicating the Constitutional issues on the merits. Appellant has shown the precedent cases and all published cases decided on the consolidation issue by the Appeal Courts of South Carolina. The Appellants' case fails to meet the criteria necessary to consolidate the cases and

with the totality of the ineffective assistance of counsel claims surely warrants this Court authority to rule on this appeal and ask the same question, "Why wasn't the Appellants' case overturned by the State Court when his case doesn't fit the mold for consolidation of South Carolinas' rules and guidelines for consolidation?" The answer maybe, because of ineffective assistance of all counsels Appellant has had throughout the process for the reasons stated in this brief.

The Appellant has had paid counsels to file timely appeals and motions throughout this process to get some court to adjudicate these issues on the merits, with the exception of the Habeas Corpus to the United States District Court of South Carolina and that was through the inaccurate timeline to file by the Appellate Defense Office of South Carolina. In retrospect, they are also employees of the State of South Carolina (government employees) and this case has snowballed with ineffective assistance of counsel. Could it be that, the State knew the Appellant may falter by this inaccurate advice and give up the claims?

Appellant asserts this Court should force South Carolina to abide by the rules and laws enacted by this State, both Constitutional and non - Constitutional issues, that were written by government officials and apply them consistently to all persons, even at the expense of admitting they were wrong in their actions.

Let's consider, even if, the trial judge made the prosecutor elect on which case he was going to proceed on (as the court should have done), they would have to of had an in camera or a pre-trial hearing as to whether the evidence of the other alleged crime could have been admitted. So isn't the formal rules of motions for consolidation more stringent than that prescribed by the introduction of evidence of "prior bad acts" (since they have at least been convicted of or pleaded guilty to the previous "bad act")? There was no hearing at all.

Appellant goes further to claim another reason this

Court hasn't been faced with this type of appeal is because usually the state adjudicates this issue in reversal. If the state courts would have adjudicated the issues and consider the totality of his claims of the entire trial, it would have reversed the conviction.

Appellant claims this court has jurisdiction to hear this case and adjudicate the issues on their merits (Constitutional and non-Constitutional because of the totality of both, makes it a serious miscarriage of justice) and should not be time-barred from this Court. Appellant claims the failure of the PCR Court and The Supreme Court of South Carolina to adjudicate these issues warrants this Court has jurisdiction to adjudicate this case on the merits, since it is in direct conflict with its' (South Carolina and United States Supreme Court) own decisions concerning the issue of consolidation and precedent case law of South Carolina and Federal Criminal Rules of Procedure 8(a). In the very least, this Court should rule, The Supreme Court of South Carolina to adjudicate these issues on the merits by precedent case law and not time bar or dismiss this case.

Does the AEDPA bar time-barred Habeas Corpus petitions that have Constitutional claims, such as ineffective assistance of counsel, the right to a fair trial and where the State and trial court procedural faulted, and that were raised and not adjudicated on their merits by the State courts?

Appellant claims the task falls to the federal courts since no state court has provided proper analysis and a full and fair opportunity to have these habeas claims diligently considered.

Appellant has always heard "ignorance of the law is no excuse" and that is true. People are taught the basic laws in the very beginning, by learning right from wrong then as they age so does there learning of what's right and wrong, school, with driving, and acceptable behavior in life. This (AEDPA) is an act by Congress to slow down the number of appeals by terrorists and by death penalty cases and such, to prolong

their execution date, but not to bar petitions that have Constitutional claims as this case does and the result is a miscarriage of justice. Yes, had the Appellant knew of this act, certainly he could and would have filed it some time ahead of the time line but the first time Appellant heard of the AEDPA was in Respondents' brief to the United States District Court.

Appellant believes these examples show an unreasonable level of competent counsel which prejudiced the Appellant to receive a fair trial. The totality of all counsels errors in this case makes one hope, some court will look at this case instead of the time bar. Appellant has demonstrated that the trial court erred in letting these cases proceed as a consolidated trial, the State faulted by not making a formal motion to consolidate as to notify the trial judge this was a consolidated trial to gain subject matter jurisdiction and defense counsel was ineffective for not objecting to the State for consolidating these two independent cases for trial.

Notes of interest; (1). in the PCR evidentiary hearing Orders the PCR stated Appellant filed a *pro se* petition on June 19, 1996 and this was a mistake, Appellant retained counsel and his father is not Gary Phillip Brogdon, Jr., it is James P. Brogdon, Jr. Appellant was acquitted of kidnapping, criminal sexual conduct 1st degree and assault with a deadly weapon, not as stated on page 4A of PCR Order which states kidnapping and aggravated assault and battery and PCR counsel was not appointed. (2). In the procedural history of the Report and Recommendations by U.S. Magistrate Judge Bristow Marchant, [Indictment 82-GS-08-447] is the 1982 incident not the 1981 incident as stated on page 35A. Also on page 36A, PCR counsel was not appointed as stated. The State's briefs to the other courts had the alleged incidents wrong also.

The Appellant is not an experienced attorney in this state or any state, but is capable of seeing and experiencing the miscarriage of justice this improperly consolidated case has

caused in his life. Wherefore, Appellant prays for this Court to end this burden by either forcing the Supreme Court of South Carolina to adjudicate the issues on their merits or for this Court to adjudicate this case the proper way the State should have many years ago.

For these reasons stated, Appellant respectfully request this Court step in and adjudicate the issues on the merits and overturn the conviction the Appellant has endured for many years.

Respectfully submitted,
Gary P. Brogdon

Gary P. Brogdon, *pro se*
7053 Midland Drive
North Charleston, SC 29406

August 24, 2006

IN THE UNITIED STATES SUPREME COURT

FOR THE FOUTH CIRCUIT

Gary Phillip Brogdon, #115008,	)	C/A No. 0:02-48
	)	CWH-BM
Petitioner	)	
	)	AFFIDAVIT FR
	)	
Charles Condon, Attorney	)	SELENA F. BRC
the State of South Carolina,	)	
	)	
	)	
Respondent.	)	
	)	

AFFIDAVIT

I, Selena F. Brogdon, do hereby swear that James P. Brogdon, Jr. and myself went to Berkeley County Courthouse in January of 1999 to review my husband's case file. His name is Gary P. Brogdon. We went there specifically to see what all Motions were in his file. He had filed some Motions to the Court and had not received any response to them and he asked me and his father to go and see if the Motions were in his file. Specifically, the Rule 11, Rule 52 and Rule 59 Motions.

Upon inspection of his file, we observed other peoples' paperwork was contained inside his case file. We reported it to the clerk behind the counter and requested a signed statement to that fact and we were denied a written statement to those facts of other

paperwork inside his case file. She simply took the other files and said she would file them in their' proper files.

The Motions that my husband asked me to look for were not contained in his files.

Selena F. Brogdon

Selena F. Brogdon
7053 Midland Drive
North Charleston, SC 29406

August 23, 2005

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, ... Respondent,

v.

Gary Philip Brogdon ..... Appellant,

Appeal From Berkeley County
James M. Morris, Judge

Memorandum Opinion No. 83-MO-287
Filed November 30, 1983

AFFIRMED

Harry O. Shaw, III, and Michael Tommy Bolus, both of North Charleston, for appellant.

Attorney General T. Travis Medlock, Assistant Attorney General Harold M. Coombs, Jr., and Senior Assistant Attorney General Brian P. Gibbes, all of Columbia; and Solicitor Charles M. Condon, of Moncks Corner, for Respondent.

PER CURIAM: Appellant was convicted of kidnapping and assault and battery of a high and aggravated nature. The Transcript of Record does not indicate the sentence imposed.

After careful consideration of the record and

briefs, we ~~are of the~~ opinion that no error of law is present, and that a full written opinion would be without precedential value. Accordingly, the judgment of the lower court is affirmed under Rule 23 of the Rules of Practice of this Court.

s/ J. Woodrow Lewis C.J.

s/ Bruce Littlejohn A.J.

s/ J. B. Ness A.J.

s/ George T. Gregory, Jr. A.J.

s/ David W. Harwell A.J.

COURT OF COMMON PLEAS
STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

Gary Phillip Brogdon, SCDC	) C/A No.:96-CP-
	) 08-0970
No. 115008	)
Applicant,	)
	)
v.	) ORDER
	)
STATE OF SOUTH CAROLINA,	)
	)
Respondent,	)
	)

Gary Phillip Brogdon has filed an application for post-conviction relief (PCR). In his PCR application, Brogdon alleges that he received ineffective assistance of counsel. The court disagrees, and for the following reasons, the PCR application is dismissed.

I. Background

On May 10, 1982, the Grand Jury for Berkeley County, South Carolina indicted Brogdon for the following offenses: (1) assault with a deadly weapon, (2) kidnapping, and (3) criminal sexual conduct, first degree. These charges arose out of an incident that occurred on February 12, 1981.

On November 1, 1982, the Grand Jury for Berkeley County, South Carolina indicted Brogdon on two additional offenses: (1) kidnapping and (2) aggravated assault and battery. These charges stem from his conduct on February 16, 1982.

The State tried Brogdon these charges during the November 9, 1982 term of General Sessions court in Berkeley County before the Honorable James Morris. Brogdon was represented by Harry O. Shaw, III and Michael T. Bolus. The jury acquitted Brogdon of the charges arising from the February 12, 1981 incident (kidnapping and aggravated assault and battery). The trial court sentenced Brogdon to life imprisonment on the kidnapping charge and to eight years' imprisonment on the aggravated assault and battery charge, with the sentences to run consecutively.

Brogdon subsequently appealed his conviction, raising three grounds on appeal. On November 30, 1983, the Supreme Court of South Carolina affirmed his convictions. *See State v. Brogdon,* No. 83-MO-287 (Nov. 30, 1983).

On June 19, 1996, Brogdon filed a *pro se* PCR application, he alleges that trial counsel improperly advised him "regarding the proposed sentence which had been agreed upon during plea negotiations." (Application for post conviction relief ¶ 10a). After being appointed counsel,[1] Brogdon filed an amended PCR application. In his amended PCR application, Brogdon raises numerous other claims of his trial counsel being ineffective.

On July 22, 1998, the court held an evidentiary hearing on the allegations raised in Brogdon's amended PCR application. At the hearing, Brogdon testified on his own behalf. In addition, Gary Phillip Brogdon, Sr. and Jerry Brogdon testified on behalf on Brogdon. The State called Harry O. Shaw and Tommy Bolus as its witnesses. The court also had

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[1] Tommy A. Thomas was appointed to represent Brogdon.

before it a copy of the transcript from Brogdon's trial, the briefs submitted on appeal, the Supreme Court's memorandum opinion affirming his convictions, and the records of the Berkeley County Clerk of Court regarding the convictions.

At the conclusion of the hearing, the court requested proposed orders from both parties. The court has received the proposed orders. After reviewing the proposed orders, the applicable law, and the record, the court concludes that this matter is ripe for adjudication.

II. Analysis

Under the sixth Amendment of the United States Constitution and under Article I, Section Thirteen of the South Carolina Constitution, criminal defendants are entitled to effective assistance of counsel. Claims that one's counsel provided ineffective assistance are evaluated under a two-pronged test.

First, a criminal defendant must show that counsel's performance "fell below an objective standard of reasonableness." *Strickland v. Washington,* 466 U.S. 668,688 (1984). In reviewing counsel's performance, "a strong presumption [exists] that counsel's conduct falls within the wide range of reasonable professional assistance," *id.* at 689, and that counsel 'made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690. In analyzing reasonableness under the performance prong, the material question is whether the performance was reasonable considering the totality of the circumstances at the time the performance was rendered. *See id.* Given this individualized inquiry into the reasonableness,

"specific guidelines are not appropriate," *id.* at 688, because a rigid regimen of guidelines " would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions." *Id.* at 689. Recognizing that post hoc rationalizations for a conviction must not be transmuted into putative ineffective assistance claims by aggrieved defendants who are attempting "to second-guess counsel's assistance," *Strickland* states that "[j]udicial scrutiny of counsel's performance must be highly deferential." *Id.* Therefore, the reviewing must make "every effort...to eliminate the distorting effects of hindsight" because "it is all to easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Id. See also Roseboro v. State,* 309 S.C. 560, 425 S.E.2d. 312, 313 (1996) ("[C]ounsel must articulate a valid reason for employing a certain strategy to avoid a finding of ineffectiveness."); *Underwood v. State,* 309 S.C. 560, 425 S.E.2d. 20, 22 (1992) ("Where counsel articulates a valid reason for employing a certain trial strategy, the conduct will not be deemed ineffective").

Second, a criminal defendant must demonstrate that he was prejudiced by his counsel's deficient performance to such a degree "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. With these principles in mind, the court will address each of Brogdon's claims.

A.

Brogdon's first claim is that he received ineffective assistance because trial counsel did not "correctly and effectively state the objection as to the Applicant's right to counsel during a photographic line-up." (Amended PCR application ¶ 9g). The court disagrees.

The United States Supreme Court has held that the Sixth Amendment does not grant the accused the right to counsel at photo line-ups conducted by the government for the purpose of identifying the offender. *United States v. Ash,* 413 U.S. 300 (1973). *See also State v. Jones,* 273 S.C. 723, 730, 259 S.E.2d 120, 124 (1979). Thus, any objection on this ground would have been futile. Because the Sixth Amendment does not require counsel to make futile objections, the court concludes that Brogdon's trial counsel acted reasonably.

B.

Brogdon next claims that he received ineffective assistance because trial counsel did not object to the trial court's reasonable doubt because the language of the charge lessened the State's burden of proof. The court disagrees.

"The Due Process Clause of the Fourteenth Amendment 'safeguard[s] against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt.' an instruction is defective if a reasonable juror could interpret it to find guilt based on a degree of proof below that required by the Due Process Clause." *State v. Manning,* 305 S.C. 413, 416, 409 S.E.2d 372,374 (1991), *cert. denied,* 503 U.S. 914 (1992) (quoting

Taylor v. Kentucky, 436 U.S. 478, 486 (1978).

In one case the Supreme Court "held that a definition of reasonable doubt violated the Due Process Clause." *Victor v. Nebraska,* 511 U.S. 1, 5 (1994). That case was *Cage v. Louisiana,*[2] and the charge on reasonable doubt instruction at issue was as follows:

> [A reasonable doubt] is the one that is founded upon a real tangible substantial basis, and not upon mere caprice and conjecture. *It must be such doubt as would give rise to a grave uncertainty,* raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. *It is an actual substantial doubt.* It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a *moral certainty.*

Cage, 498 U.S. at 40.

In *State v. Manning,*[3] the Supreme Court of South Carolina reversed the defendant's conviction for murder because it concluded that the trial court's instruction on reasonable doubt "as a whole suggest[ed] a higher degree of doubt than that required for acquittal." *Id* at 417, 409 S.E.2d at 374. In *Manning,* the trial court's instructions concerning reasonable doubt were as follows:

> Beyond a reasonable doubt, in telling you that that degree of proof by which the State must prove, that phrase means exactly what it

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[2] 498 U.S. 39 (1990) *overruled in part by Estelle v. McGuire,* 502 U.S. 62 (1991).

[3] 305 S.C. 413, 409 S.E.2d 372 (1991), *cert. Denied,* 503 U.S. 914 (1992).

states in the English language, and *that is a doubt for which you can give a real reason.* that excludes a whimsical doubt, fanciful doubt. You could doubt every proposition if you wanted to. *A reasonable doubt is a substantial doubt for which honest people, such as you, when searching for the truth can give a real reason.* So it's to that degree of proof that the State is required to establish the elements of the charge.

....

Sometimes during a charge, and I might have used it , the phrase moral certainty might be used. There is no different degree of proof required. *Moral certainty and beyond a reasonable doubt are the same thing in the eyes of the law.* It might be a different way of stating the same proposition. *Either of those two phrases, moral certainty, beyond a reasonable doubt, connote[s] a degree of proof which is distinguished from an absolute certainty.*

Id. at 415-16, 409 S.E.2d at 374.

The trial court in *Manning* also gave the following charge on circumstantial evidence:

> I would instruct you to seek some reasonable explanation of the circumstances proven other than the guilt of the Defendant and if such a reasonable explanation can be found you would find the Defendant not guilty....

Manning, 305 S.C. at 416, 409 S.E.2d at 374.

After reviewing the trial court's instruction as a whole, the supreme court held that "the defective aspects of the trial judge's charge on reasonable doubt rendered it so confusing that a reasonable juror could

have interpreted the charge as a whole to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." *Id.* at 417, 409 S.E.2d at 375.

Turning the instruction on reasonable doubt given in Brogdon's case, the trial court's instruction was as follows:

> Now what is reasonable doubt? It is not an imaginary or a fanciful or a weak doubt, rather is a doubt which the words implie [sic], a doubt for which you can give a reason. If you have doubt for which you can give a reason as to the guilt of the defendant, then he would be entitled to a verdict of not guilty. Reasonable doubt from evidence which is in the case or from the absence or lack of evidence in the case.

(Trial transcript at 327-28).

The trial court also gave the jury an instruction on circumstantial evidence. In instructing the jury on circumstantial evidence, the trial court stated that "[in] the consideration of circumstantial evidence, you must seek some reasonable explanation thereof other than the guilt of the accused and if such reasonable explanation can be found, you cannot convict on such evidence." *Id.* at 332.

When read as a whole, the trial court's instructions in this case are problematic in two respects. First, in defining "reasonable doubt," the trial court used the "a doubt for which you can give a real reason" language. Second, in instructing the jury on circumstantial evidence, the trial court used the "you must seek some reasonable explanation thereof other than the guilt of the accused" language. As demonstrated in *Manning,* instructions such as these charges when read together "could mislead a juror to

focus exclusively on appellant's explanation of the evidence to determine the existence of reasonable doubt." *Id.* at 417, 409 S.E.2d at 375.

Nevertheless, the court concludes that trial counsel's failure to object to the trial court's instruction on reasonable doubt did not constitute ineffective assistance. Significantly, Brogdon's trial occurred several years before the Supreme Court decided *Manning.* furthermore, unlike the respective charges in *Cage* and *Manning,* the trial court's charge on reasonable doubt in this case did not equate "reasonable doubt" with a "substantial doubt" or "moral certainty." Accordingly, the trial court concludes that trial counsel acted reasonably in not objecting to the charge on reasonable doubt.[4] *See State v. Johnson,* 306 S.C. 119,129-31, 410 S.E.2d 547, 553-54 (1991) (affirming the defendant's conviction and sentence of death where the trial court's instruction on reasonable doubt is not a "weak doubt, or a fanciful doubt, but a doubt for which you can give a reason"), *cert. denied,* 503 U.S. 993 (1992).

C.

Brogdon's third claim is that he received ineffective assistance because trial counsel did not "properly investigate certain aspects of the case including whether, based on the evidence presented, the state's time line of the crime was plausible." (Amended PCR application ¶ 9i). The court disagrees.

After hearing the evidence at the evidentiary

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[4] Brogdon also makes a similar claim against his appellant counsel. (Amended PCR application ¶ 9j). For the reasons discussed, the court concludes that this claim is meritless.

hearing and reviewing the transcript, the court finds that trial counsel thoroughly investigated the time lines as claimed by the State and Brogdon. Additionally, trial counsel presented witnesses and arguments at trial to persuade the jury that the State's time line was not plausible. Therefore, the court concludes that Brogdon failed to demonstrate how trial counsels' performance in this area was deficient.

D.

Brogdon's fourth claim is that he received ineffective assistance because trial counsel failed "to correctly and effectively state the objection to the state's bolstering of witnesses." (Amended PCR application ¶ 9h). The court disagrees.

The court finds that the first example cited by Brogdon (Trial transcript at 163, line 9) referred to the incident for which he was acquitted. Therefore, Brogdon cannot demonstrate that he was prejudiced by trial counsels' failure to object.

The second example cited by Brogdon is a portion of the testimony from Bonnie Ermann. (*Id.* at 125, lines 6-10) (testifying about the victim's emotional state after the incident). At the trial of this case, Brogdon did not dispute the victim's allegation she was assaulted. Rather, Brogdon claimed that he was not the individual who committed the assault. Thus the court concludes trial counsel's failure to object did not prejudice Brogdon.[5]

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[5] Brogdon also makes a similar claim against his appellate counsel. (Amended PCR application ¶ 9m). For the reasons discussed, the court concludes that this claim also is without merit.

E.

Brogdon's final claim is that he received ineffective assistance because trial counsel did not advise or persuade him to accept the State's plea offer of ten years on two counts of aggravated assault and battery. The court disagrees.

"[T]he Sixth Amendment protects criminal defendants against ineffective assistance of counsel during the plea bargaining process, even if the plea offered is ultimately rejected." *Judge v. State,* 321 S.C. 554, 560, 471 S.E.2d 146, 149 (1996). In discussing how a criminal defendant would satisfy a claim of ineffective assistance for advice received during the plea bargaining process, that the following conduct could "constitute incompetence almost per se": (1) the failure of counsel to advise his client of a plea bargain or (2) the advice to reject a plea agreement when the advice is not based on an evaluation of the merits of the case and of the risks borne by the defendant, but on trial counsel's desire for trial publicity. *Id.* at 561, 471 S. E.2d at 150.

To establish prejudice for counsel's advice on whether to accept a plea offer, the defendant must show "'through *objective* evidence'" that a reasonable probability exist that he would have accepted the plea offer, but for counsel's advice. *Id.* at 562, 471 S.E.2d at 150 (quoting *Turner v. Tennessee,* 664 F. Supp. 1113, 1121 (M.D. Tenn. 1987).

At the evidentiary hearing, Brogdon testified that he understood that he would serve a maximum of ten years if he accepted the plea bargain while he would serve a maximum of twelve years if he was

convicted after a trial.[6] Because the difference only was two years, Brogdon testified that he decided to reject the plea offer. His father, Gary Phillip Brogdon, Sr., also testified that this was his understanding of the difference in the potential sentences between the plea offer and a conviction.

On the other hand, trial counsel testified that they advised Brogdon to accept the plea offer and that he refused to accept it because he believed his wife would leave him if he admitted guilt.

The court has observed the witnesses at the evidentiary hearing, and the court finds that Brogdon's testimony in this regard is not credible and that trial counsels' testimony is credible. Because Brogdon's decision to reject the plea offer was not based upon the advice of his counsel, the court concludes that he has not shown that their advice on the possible sentences that he was facing, if it was as he alleges,[7] prejudiced him.

F.

As to any and all other allegations which were or could have been made in the application or at the evidentiary hearing in this matter, the court finds that the Brogdon failed to present any credible evidence regarding any such allegations. Accordingly, the court finds that the Brogdon failed to meet his burden of

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[6] According to Brogdon, this prediction as to his release date was based upon trial counsels' belief that he would receive parole in ten to twelve years if convicted and sentenced to life for kidnapping.

[7] The court further finds that trial counsel and Brogdon discussed parole, but that trial counsel did not promise Brogdon when or whether he would receive parole.

proof as required by Rule 71.7(e),S.C.R.C.P. *See also Butler v. State,* 302 S.C. 466,397 S.E.2d 87 (1980). accordingly all additional allegations are waived or denied and dismissed with prejudice.

III. Conclusion

For all the foregoing reasons, Brogdon's PCR application is dismissed with prejudice, and it is so ordered that he be remanded to the custody of the State of South Carolina.

In addition, the court advises Brogdon that he if chooses to appeal this order, he must file a notice of intent to appeal within thirty days from the receipt of this order to secure the appropriate appellate review. His attention is also directed to Rules 203, 206 and 227, South Carolina Appellate Court Rules, for appropriate procedures allowing or appellate review of post-conviction relief actions.

IT IS SO ORDERED.

"s/ Daniel Pieper"
Daniel F. Pieper
Judge of the Ninth Judicial Circuit

Moncks Corner, South Carolina

October 22 1998

96-CP-08-0970-ADG
cc: Matthew M. McGuire
Tommy A. Thomas

The Supreme Court of South Carolina
Daniel E. Shearouse
Clerk Of Court
Brenda F. Shealy
Deputy Clerk

Post Office Box 11330
Columbia, South Carolina 29211
803) 734-1080
Fax (803) 734-1499

May 14, 1999

Assistant Appellate Defender Aileen P. Claire
Office of Appellate Defense
1122 Lady Street, Suite 940
Columbia, SC 29201

Re: **Brogdon, Gary Phillip v. State**
96-CP-08-970

Dear Counsel:
Enclosed is the Order of this Court issued pursuant to your Motion for Leave to File a Motion to Alter or Amend Judgment Pursuant to Rules 59 and 60, South Carolina Rules of Civil Procedure in the above-entitled matter.
Please take notice that this matter is being remanded to the lower court for further consideration, and the appeal in this Court is dismissed without prejudice.
By copy of this letter and Order, we are advising all interested parties of the action by the Court.

Very truly yours,
"s/DES"
CLERK

DES/sgl

cc: Assistant Attorney General Matthew M. McGuire

THE SUPREME COURT of SOUTH CAROLINA

Gary P. Brogdon, Petitioner,

v.

State of South Carolina, Respondent

ORDER

Petitioner filed an application for post-conviction relief (PCR) that was denied after a hearing. Petitioner, pro se, filed a motion pursuant to Rule 59, SCRCP, seeking reconsideration of the denial of PCR while petitioner's counsel filed a notice of appeal with this Court. Petitioner then filed a motion with this Court for leave to file motions to alter or amend the judgment pursuant to Rules 59 and 60, SCRCP.

We remand this case to the lower court for consideration of petitioner's pro se Rule 59, SCRCP, motion and dismiss petitioner's appeal without prejudice. Petitioner's motion for leave to file motions to alter or amend the judgment pursuant to Rules 59 and 60 is denied as unnecessary.

IT IS SO ORDERED.

"s/ ERNEST A FINNEY, JR C.J."

FOR THE COURT

Columbia, South Carolina
May 14, 1999

COURT OF COMMON PLEAS
STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

Gary Phillip Brogdon, SCDC	) C/A No.:96-CP-
	) 08-0970
No. 115008	)
Applicant,	)
	)
v.	) ORDER
	)
STATE OF SOUTH CAROLINA,	)
	)
Respondent,	)
	)

This matter is before the court upon remand from the Supreme Court of South Carolina "for consideration of petitioner's *pro se* Rule 59, SCRCP, motion[.]" For the following reasons, the court denies the petitioner's motion.

I.

On June 19, 1996, the petitioner filed an instant application for post-conviction relief (PCR). On July 22, 1998, the court held an evidentiary hearing on the allegations raised in the PCR application, and on October 22, 1999, the court issued an order denying the PCR application.

The record shows that counsel for the respondent mailed a copy of the court's order to the petitioner and his counsel. Although the file does not contain a notice of appeal on November 2, 1998. (Motion for leave to file a motion to alter or amend judgment pursuant to Rules 59 and 60 ¶ 1).

Despite the filing the notice of appeal, the record also contains a motion to alter or amend the judgment that is dated November 11, 1998.[1] This motion, however, does not appear to have been filed with the court. Further, the record contains a motion pursuant to Rule 60(b)(1), SCRCP, for relief from judgment so that the petitioner could raise three new claims. The motion was filed on January 26, 1999.

On March 25, 1999, petitioner's counsel filed a motion to alter or amend judgment pursuant to Rules 59 and 69. On May 14, 1999, the Supreme Court of South Carolina entered an order denying the motion for leave to file motions to alter or amend the judgment pursuant Rules 59 and 60, but remanded the case to the court for consideration of petitioner's *pro se* Rule 59 motion.

II. Analysis

The court denies Brogdon's motion to alter or amend the judgment because it was not filed timely; in the alternative, the court denies the motion on the merits.

Rule 59(e), SCRCP, requires a party to file its motion to alter or amend the judgment no later than ten days after receipt of written notice of the entry of the order.

In this case, the record shows that the petitioner prepared a motion to alter or amend and that the motion was dated November 11, 1998. The motion, however, was not filed with the court. The petitioner's failure to file the motion is evidenced by the lack of any date stamp upon the motion. Thus, the

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[1] It appears that the petitioner did not receive a copy of the order until November 9, 1998.

petitioner's motion is untimely.

Even if the petitioner's motion to alter or amend had been timely filed , the court concludes that it is without merit. Accordingly, the court denies the motion on this alternative basis.

III. Conclusion

For all the foregoing reasons, the court denies the petitioner's motion to alter or amend.

IT IS SO ORDERED.

"s/ Danny Pieper "
Daniel F. Pieper
Judge of the Ninth Circuit

Charleston, South Carolina

June 28, 1999

The Supreme Court of South Carolina
Daniel E. Shearouse Post Office Box 11330
Clerk Of Court Columbia, South Carolina 29211
Brenda F. Shealy 803) 734-1080
Deputy Clerk Fax (803) 734-1499

February 9, 2001

Assistant Appellate Defender Aileen P. Claire
Office of Appellate Defense
1122 Lady Street, Suite 940
Columbia, SC 29201

Re: Brogdon, Gary Phillip v. State

Dear Counsel:

The Court has issued the following Order on your Petition for a Writ of Certiorari in the above entitled matter:

"Petition for Writ of Certiorari denied.

s/ Jean H. Toal C.J.
For the Court

February 09, 2001."

The remittitur in this matter will be forwarded to the Clerk of Court for Berkeley County pursuant to the provisions for Rule 221 of the South Carolina Appellate Court Rules.

Very truly yours,
"s/ Brenda F. Shealy"
DEPUTY CLERK

BFS/edc
Cc: Assistant Attorney General Matthew M McGuire
Assistant Attorney General Patricia D.Breen

The Supreme Court of South Carolina

Daniel E. Shearouse Post Office Box 11330
Clerk Of Court Columbia, South Carolina 29211
Brenda F. Shealy 803) 734-1080
Deputy Clerk Fax (803) 734-1499

February 27, 2001

REMITTUTUR

The Honorable Mary P. Brown
Clerk of Court, Berkeley County
PO Box 219
Moncks Corner, SC 29461-0219

Re: Brogdon, Gary Phillip v. State (96-CP-08-970)

Dear Mr. Brown:

The above referenced matter is hereby remitted to trial court. A copy of the judgment of this Court is attached.

Very truly yours,
"s/ DES"DES/edc

Enclosure
Cc: Assistant Appellate Defender Aileen P. Claire
Mr. Gary P, Brogdon, #115008
Assistant Attorney General Matthew M. McGuire

(STAMP) ATTORNEY GENERAL'S OFFICE
Received 3-6-01

ADMINSTRATIVE INSTRUCTIONS
____FILE____OPEN____END
____HAVE___COPIES MADE
____ROUTE TO_____
____ORDER____TRANSCRIPT
___PEN RECORDS__CLERK RECORDS
__OTHER_____

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

Gary Phillip Brogdon, Petitioner,	)	C/A No. 0:02-483- 12BD
vs.	)	ORDER
Charles Condon, Attorney General for the State of South Carolina Respondent,	)	STAMPED ENTERED 06/17/02

The pro se petitioner in this case, Gary Phillip Brogdon, has filed a complaint pursuant to 28 U.S.C. 2254 challenging his underlying state court conviction and sentencing. On November 12, 1982, the petitioner was found guilty by a jury of his peers in the Court of General Sessions for Berkeley County of kidnapping and aggravated assault and battery. The petitioner was subsequently sentenced to terms of imprisonment of life for the kidnapping charge and eight years for the aggravated assault and battery, to run consecutively. The petitioner's conviction was affirmed by the South Carolina Supreme Court. See Petition for Writ of Habeas Corpus at 2-3[1]. The petitioner's Applications

[1] According to the petition, the South Carolina Supreme Court affirmed the petitioner's conviction on November 30, 1983. A Westlaw search yielded no published or unpublished opinion to that effect.

for Post Conviction Relief were likewise dismissed, *with prejudice,* the first on October 22,1998, and the second on June 28, 1999 . Id. At 3.

Following dismissal of the petitioner's applications for post conviction relief in the state court.
He instituted this petition for writ of habeas corpus pursuant to 28 U.S.C. 2254. Consistent with the local custom in this District, the matter was referred to United States Magistrate Judge Bristow Marchant for resolution of pretrial matters. See DSC Local Rule 73.02(B)(2)(c). In an Order filed on February 27, 2002, Magistrate Judge Marchant informed the petitioner that his habeas petition was not in proper form. The Magistrate Judge's Order further granted the petitioner an additional twenty days to pay the filing fee or, in the alternative, to file a motion to proceed *in forma pauperis* and advised the petitioner of the serious consequences of a failure to comply with the Order.

To date, the petitioner has failed to comply with the Order of the Magistrate Judge. It is therefore ordered that the petition for writ of habeas corpus be dismissed *without prejudice* and without services fo process upon the respondent.

AND IT IS SO ORDERED.

"s/ C. Weston Houck"
C. WESTON HOUCK
UNITED STATES DISTRICT JUDGE

June 12, 2002
Charleston, South Carolina

UNITIED STATES DISTRICT COURT

DISTRICT OF SOUTH CAROLINA

Gary Phillip Brogdon, #115008	)	C/A No.0:02-483-CWH-BM
Petitioner,	)	
vs.	)	
Henry D. McMaster, Attorney General for the State of South Carolina	)	Motion To Reopen
Respondent,	)	

I am requesting that my case be reopened due to

MOOT (STAMP)

9/29/04 FILED

DATE SEP 29 2004

BRISTOW MARCHANT Larry W. Propes

U.S. MAGISTRATE JUDGE Columbia, SC

"no order dated on this date 9/30/04

Re-opening case" (in handwriting)

UNITIED STATES DISTRICT COURT

DISTRICT OF SOUTH CAROLINA

Gary Phillip Brogdon, #115008	)	C/A No.0:02-483-CWH-BM
Petitioner,	)	
vs.	)	
Henry D. McMaster, Attorney General for the State of South Carolina	)	Motion To Reopen
Respondent,	)	

I am requesting that my case be reopened due to

GRANTED (STAMP)

9/29/04 FILED

DATE SEP 29 2004

BRISTOW MARCHANT Larry W. Propes

U.S. MAGISTRATE JUDGE Columbia, SC

"case is to be re-opened and referred 9/30/04 to ??? Law clerk to see if case is (in hand writing) In proper form."

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

Gary Phillip Brogdon, #115008,	**)**	**C/A No. 0:02-483-CWH-BM**
Petitioner,	)	
vs.	)	
Charles Condon, Attorney General for the State of South Carolina,	)	**Order**
Respondent,	)	

A Petition for Writ of Habeas Corpus has been submitted to the Court under 28 U.S.C. 2254. On February 27, 2002, an initial Order was entered in this case. (Document 2). Due to mail delivery and address change problems, Petitioner did not receive that Order within a sufficient time to permit him to comply with the directions therein, and this case was dismissed without prejudice for failure to comply with the initial Order on June 17, 2002. (Document 3).

On January 30, 2003, Petitioner paid the $5.00 filing fee in the case. *See* Receipt No. 20015995. On the same date, Petitioner filed a Motion to Reopen this case due to extenuating circumstance. (Document 4). No ruling was made on that Motion; however, following the filing of another Motion to Reopen (Document 7) in September 29, 2004. (Document 8). Review of the file discloses that the Petition should now be served on Respondent and that Respondent should file an answer to the Petition.

Accordingly, the Clerk of Court shall serve copies

of this Order and the section 2254 Petition (Document 1) on Respondent by depositing copies of each in the United States Mail by certified mail addressed to:

1. General Counsel
   South Carolina Department of Corrections
   4444 Broad River Road
   Columbia, SC 29210

2. Attorney General of South Carolina
   P.O. Box 11549
   Columbia, SC 29211

The Clerk of Court shall also include a form upon which the General Counsel of the South Carolina Department of Corrections and the Attorney General of South Carolina shall acknowledge receipt of copies of this Order and the section 2254 Petition, together with a self-addressed envelope for return of the form.

Respondent(s) shall file answer(s) or other response(s) to the Petition as soon as reasonably possible, but no later than fifty (50) days from the date of service of this Order.[1]

For Petitioner's future reference, if Petitioner wants copies of items that he files with the Clerk of Court returned to him, he (the Petitioner) must provide the copies and a self-addressed envelope with sufficient postage attached to the envelope for return mail.

In all future filings with this Court, Petitioner is

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[1] Prior to amendment in 2002 (eff. December 1, 2002) Rule 81 (a) (2) of the Federal Rules of Civil Procedure provided a return-time of forty (40) days for respondents to answer petitions brought under 28 U.S.C. 2254. Under Rule 4 of the Rules for Section 2254 Cases, and in light of customary practice in the District Court for the District of South Carolina, a fifty (50) day period for filing answers or other pleadings has been adopted as standard.

directed to write or type text on one side of a sheet of paper only and not write or type on both sides of any sheet of paper.[2] Petitioner is further instructed not to write to the edge of the paper, but to maintain one inch margins on the top, bottom, and sides of each paper submitted. Petitioner will strictly comply with requirements for "short and plain" statements of claims and defenses in all pleadings under Rule 8 Federal Rules of Civil Procedure (Fed. R. Civ. P.) as well as the requirements for "concise summary," and "brevity" set forth in Local Civil Rule 7.05 of the United States District Court for the District of South Carolina.

Petitioner is also hereby apprised that, after counsel for Respondents has entered an appearance or filed and answer (or other responsive pleading), a copy of any subsequent pleading, motion, and other paper filed by Petitioner with the Clerk of Court in connection with this case is to be served upon the counsel for Respondents and that a certificate verifying such service (aka "Certificate of Service") is to be filed with the Office of the Clerk of Court.

Petitioner is a *pro se* litigant. His attention is directed to the following important notice:

TO PETITIONER:

You are ordered to always keep the Clerk of Court advised in writing (**901 Richland Street, Columbia, South Carolina 29201**) if your address changes for any reason, so as to assure that orders or other matters

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[2] Pursuant to Section 205 of the E-Government Act of 2002, Pub. L. 107-347, December 17, 2002, 111 Stat. 2899, this Court has implemented Electronic Case Filing (ECF). For this purpose, *pro se* filings are scanned to create electronic docket records. Therefore, the use of only one side of a sheet of paper is required.

that specify deadlines for you to meet will be received by you. If as a result of your failure to comply with this Order, you fail to file something you are required to file within a deadline set by a District Judge or a Magistrate Judge, your case may be dismissed for violating the Order. Therefore, if you have a change of address before this case is ended, you must comply with this Order by immediately advising the Clerk of Court in writing of such change of address. Your failure to do so will not be excused by the Court.

Put this Order with you own record oaths case so that you will not overlook your duty. If an attorney serves you by mail on behalf of a Respondent, you also have a duty to notify that attorney if your address is to be changed for mail purposes.

Petitioner is, hereby, informed that if his address changes in the future, he must provide *his* prison or jail address. Hence, the Office of the Clerk of Court shall *not* enter any change of address submitted by the Petitioner which directs that mail to be sent to a person other than the Petitioner unless that person is an attorney admitted to practice before this Court, and the attorney has entered an appearance.

IT IS SO ORDERED.

s/ BRISTOW MARCHANT
Bristow Marchant
United States Magistrate Judge

May 12, 2005
Columbia, South Carolina

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA ROCK HILL DIVISION

Gary Phillip Brogdon,

Petitioner,) Civil Action No.:) **0:01-483-CWH-BM**))

Charles Condon, et al **ORDER**

Respondents,))

In this federal habeas corpus action, the respondents have filed a return which incorporates South Carolina court records pertaining to the petitioner's state conviction. The respondents have moved for summary judgment, based on those records. The respondents argue that the South Carolina courts have correctly decided certain federal questions raised in the petition for a writ of habeas corpus, and that the petitioner is either raising other matters here that have not been presented to the South Carolina courts for review, as required by Title 28, United States Code, Section 2254, and controlling cases decided by higher federal courts, or that matters alleged by the petitioner are foreclosed from federal review because of a failure earlier to comply with proper state procedural rules.[1]

As to the petitioner's grounds for relief which have

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[1] See e.g., Cole v. Stevenson, 620 F.2d 1055 (4th Cir.), cert. denied, 449 U.S 1004 (1980).

been properly presented to and decided by the South Carolina courts, the United States District Court will review the South Carolina records, unless the District Court concludes that the entire petition must be dismissed because this is a mixed petition.[2] If the District Court concludes that the petition is not a mixed petition, and that proper federal grounds have been disposed of by correct findings of fact, and that a correct application of federal constitutional law has been made by the South Carolina courts, the motion for summary judgment will be granted. For this reason, the petitioner is hereby advised the he or she has a right under Rule 56 of the Federal Rules of Civil Procedure to file any material he or she wants the District Court to consider before it rules on the motion for summary judgment. The petitioner will have thirty-four(34) days from the date of this order to file written opposition to the motion for summary judgment, and unless a timely response is filed, summary judgment will most probably be entered. (If the petitioner responds, summary judgment may still be entered if the District Court concludes that the South Carolina courts have correctly decided the

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[2] See Rose v. Lundy, 455 U.S. 509 (1982). In Rose v. Lundy, the Supreme Court of the United States concluded that a "mixed" petition (a petition raising both exhausted grounds and unexhausted grounds) should be dismissed, with leave for the petitioner to submit either a new petition that contains only grounds as to which state remedies have been exhausted, or to complete exhaustion as to all grounds before submitting another federal petition, with a *caveat* to the petitioner that if he or she elects the first option, and later submits another petition if state relief is denied on the unexhausted ground(s), he or she may be confronted by the bar of Rule 9(b) of the Section 2254 Rules, under which successive petitions can be barred in some circumstances.

federal questions raised in the case.)

An explanation of summary judgment procedure is attached hereto, together with a copy of excerpts quoted from Rules 12 and 56 of the Federal Rules of Civil Procedure, for the information of the petitioner.[3]

As to any alleged grounds contained in the petition which have not been presented to and fully decided by the South Carolina courts, the petitioner shall have a like period of **thirty-four(34)** days to show cause why the District Court should not dismiss the entire petition as a mixed petition because of the failure of the petitioner to exhaust all remedies in the courts of South Carolina, as required by 28 U.S.C. 2254 (b) and (c), as to every ground alleged here for federal relief.

August 2, 2005 "s/ BM"

Bristow Marchant
United States Magistrate Judge

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[3]Whenever a motion for summary judgment is based on records of a state court (or courts) , the findings of the state court(s) are presumed to be correct, and are entitled to deference under 28 U.S.C. 2254. Therefore, a petitioner if he or she is to overcome the presumptive validity of the state court findings, must establish why the United States District Court should reject the findings of the state court(s) by showing a defect of any one of the factors enumerated in 28 U.S.C. 2254(d). If a petitioner contends that state courts incorrectly applies federal constitutional principles of law, he or she should clearly explain the reason for making such contention, citing cases if the contention is based on reported decisions. While a federal constitutional questions presented in a 2254 case.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Gary Phillip Brogdon, #115008, Petitioner,	) Civil Action No. 0:02-483-CWH-BM
v.	
Charles Condon, Attorney General for The State of South Carolina, Respondent,	**) Report and Recommendation**

Petitioner, a former inmate with the South Carolina Department of Corrections, seeks a writ of habeas corpus pursuant to 28 U.S.C. 2254. Petitioner is presently on parole supervision. The petition was filed on February 21,2002.

On February 27, 2002, an initial Order was entered in this case granting Petitioner twenty (20) days to get his Petition in proper form. (Document 2). When nothing further was received from the Petitioner, the case was dismissed on June 17, 2002 without prejudice for failure to comply with the initial Order. (Document 3). Thereafter, on January 30, 2003, Petitioner paid the $5.00 filing fee in this case; *see* Receipt No. 20015995; and moved to reopen this case due to extenuating circumstances. (Document 4). No ruling was made on that motion; however, following the filing of another Motion to Reopen (Document7) in September 2004, the motion was granted on September 29, 2004. (document 8). The Petition was served.

The Respondents have filed a return and motion for summary judgment on August 1,2005. As

the Petitioner is proceeding pro se, a Roseboro, order was filed on August 2, 2005, advising the Petitioner that he had thirty-four (34) days to file in opposition to the motion for summary judgment. Petitioner was specifically advised that if he failed to respond adequately, the motion for summary judgment may be granted, thereby ending his case. On October 7, 2005, after being granted an extension of time, Petitioner filed a brief in opposition. This matter is now before the Court for disposition.[1]

Procedural History

Petitioner was indicted in May 1982 in Berkeley County for assault with a deadly weapon [Indictment No. 82-GS-08-234], kidnapping, and criminal sexual conduct [Indictment No. 82-GS-08-232] (February 12, 1981 incident). The Berkeley County Grand Jury also indicted Petitioner at the November 1982 term of court on additional counts of kidnapping and aggravated assault and battery [Indictment No. 82-GS-08-447] (February 16, 1981 incident). (R.pp. 567-572). Petitioner was represented by Harry O. Shaw, III, Esquire, and Michael T. Bolus, Esquire. (R.p.1). On November 9, 1982, Petitioner was tried by a jury and was acquitted of the charges arising from the February 12, 1981 incident, but found guilty of kidnapping and aggravated assault charge stemming from the February 16, 1982 incident. (R.pp. 346-347). Petitioner was sentenced to

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[1] This case was automatically referred to the undersigned United States Magistrate Judge for all pretrial proceedings pursuant to the provisions of 28 U.S.C. 636(b)(1)(A) and (B) and Local Rule 73.02(B)(2)(c) and (e), D.S.C. the Respondents have filed a motion for summary judgment. As this is a disparities motion, this Report and Recommendation is entered for review by the Court.

life imprisonment for kidnapping, and eight (8) years, consecutive, for aggravated assault and battery. (R.pp. 578).

Petitioner timely filed a direct appeal of his conviction. Petitioner continued to be represented on appeal by Shaw and Bolus, who raised the following claims:

1. Whether the photographs used by the State at the pre-trial identification and at trial were so dissimilar to the appearance of the Defendant and so dissimilar to the description given by the victims of their assailant as to violate due process.
2. Whether the Defendant's right to counsel was violated?
3. Whether the "Allen" charge was coercive considering all factors existing at the time the chage [sic] was given?

(R.p. 354).

On November 30, 1983, the South Carolina Supreme Court affirmed the conviction. State v. Gary Phillip Brogdon, 83-MO-287 (S.C.S.Ct. filed Nov. 30, 1983). (R.p. 383).

On June 19, 1996, Petitioner filed an application for post-conviction relief ("APCR") in state circuit court. (R.pp. 384-387). Brogdon v. State of South Carolina, 96-cp08-970. Petitioner raised the following issue in this APCR:

1. Applicant was denied the right to effective assistance of Counsel guaranteed by the Sixth Amendment due to trial counsel's incorrect advise regarding his possible sentence.

(R.p. 385)

After appointment of counsel, Petitioner's counsel amended the petition to raise the following additional issues:

9b. Applicant was denied the right to effective assistance of counsel guaranteed by the Sixth Amendment due to trial counsel's failure to spend adequate time with Applicant prior to his trial.

9c. Applicant was denied the right to effective assistance of counsel guaranteed by the Sixth Amendment due to trial counsel's inexperience as criminal attorneys.

9d. Applicant was denied the right to effective assistance of counsel guaranteed by the Sixth Amendment due to trial counsel's failure to correctly and effectively state the objection to trial judge's instruction regarding reasonable doubt.

9e. Applicant was denied the right to effective assistance of counsel guaranteed by the Sixth Amendment due to trial counsel's failure to correctly and effectively state the objection to trial judge's "Allen charge" to the jury.

9f. Applicant was denied the right to effective assistance of counsel guaranteed by the Sixth Amendment due to trial counsel's failure to correctly and effectively state the objection as to the photographic line-up used in identifying the Applicant.

9g. Applicant was denied the right to effective assistance of counsel guaranteed by the Sixth Amendment due to trial counsel's failure to correctly and effectively state the objection as to the Applicant's right to counsel during the photographic line-up.

9h. Applicant was denied the right to effective assistance of counsel guaranteed by the Sixth Amendment due to trial counsel's failure to correctly and effectively state the objection to

the state's bolstering of witnesses.

9i. Applicant was denied the right to effective assistance of counsel guaranteed by the Sixth Amendment due to trial counsel's failure to properly investigate certain aspects of the case including whether, based on the evidence presented, the state's time line of the crime was plausible.

9j. Applicant was denied the right to effective assistance of appellate counsel guaranteed by the Sixth Amendment due to trial counsel's failure to bring forth as an issue for direct appeal the trial judge's incorrect charge to the jury regarding reasonable doubt.

9k. Applicant was denied the right to effective assistance of trial counsel guaranteed by the Sixth Amendment due to trial counsel's failure to correctly and effectively question potential jurors in the voir dire as to their history with crimes against women.

9l. Applicant was denied the right to effective assistance of appellate counsel guaranteed by the Sixth Amendment due to appellate counsel's failure to properly bring forth an issue for direct appeal the trial judges incorrect "Allen charge" to the jury.

9m. Applicant was denied the right to effective assistance of appellate counsel guaranteed by the Sixth Amendment due to appellate counsel's failure to properly bring forth an issue for direct appeal the state's bolstering of witnesses.

R.pp. 388-389, 398).

An evidentiary hearing was held in this matter on July 22, 1998, (R.pp. 396-499). On October 22, 1998, the PCR judge issued a final order dismissing

the APCR in its entirety. (R.pp. 500-512). Petitioner filed a pro se Motion to Alter or Amend Judgment and a Motion for Relief from Judgment, dated November 11, 1998, and January 21, 1999, respectively. (R.pp. 515, 517-523). A separate motion to alter or amend judgment was also filed by counsel on March 25, 1999. (R. pp. 528-530). These motions were denied by the PCR judge on June 28, 1999. R.pp. 574-576).

Petitioner filed a timely Notice of Appeal. Petitioner was represented on appeal by Aileen P. Claire of the South Carolina Appellate Defense. Petitioner raised the following issues in this appeal:

1. Was trial counsel ineffective for failing to object to the consilodation [sic] of unrelated crimes into one trial?
2. Was trial counsel ineffective for failing to object to the court's improper instruction on reasonable doubt?
3. Was trial counsel ineffective for failing to fully advise Petitioner regarding a favorable plea agreement offered by the State before Petitioner's conviction?

See Petition, p.2

The South Carolina Supreme Court denied certiorari in an unpublished opinion order filed February 9, 2001. See Letter Order dated February 9, 2001. the Remittitur was sent to the Berkeley Clerk of Court on February 27, 2001.

In his pro se Petition for writ of habeas corpus filed in the United States District Court, petitioner raises the following claims:

Ground One: Due Process Violation, Miscarriage of Justice - Misjoinder of Charges, Prejudicial to a fair trial.

Petitioner claims his rights to a fair trial

protected by the South Carolina Constitution, the 5th and 6th Amendments to the United States Constitution, the Federal Rules of Criminal Procedure, Rules 8 and 14 and his 14th Amendment Rights to Due Process and Equal Protection of the Law has been violated by Misjoinder/Consolidation of the Court of General Sessions of Berkeley County on November 9, 1982. The alleged charges grew out of two distinct and separate transactions with no similar proof for each charge.....

Ground Two: Trial Court Lacked Subject Matter Jurisdiction to proceed to trial.

Petitioner's claims that the improper joinder/consolidation of charges regarding two separate incidents, occurring more than a year apart, renders the trial court without jurisdiction to proceed with the trial of Petitioner, on all charges...

Ground Three: Ineffective Assistance of Trial Counsel.

(A) In his application for Post-Conviction relief (PCR), Petitioner claimed trial counsel was ineffective for failing to move to sever the charges. The court found counsel was not ineffective. This ruling was error....

(B) Trial counsel was ineffective for failing to object to the courts improper instruction on reasonable doubt and the courts "Allen" charge.

(C) Trial counsel was ineffective to advise petitioner regarding a favorable

plea agreement offered by the State before petitioner's conviction. Trial counsel failed to advise Petitioner regarding a plea under North Carolina v. Alford.

See Petition, pp. 5-7.

Discussion

Respondents have moved for summary judgment pursuant to Rule 12 (b) and Rule 56 (b), Fed.R.Civ.P., submitting that the entire petition is without merit. Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), Fed.R.Civ.P;see Habeas Corpus Rules 5-7. Further, while the federal court is charged with liberally construing pleadings filed by a pro se litigant to allow the development of a potentially meritorious case; See Cruz v. Beto, 405 U.S. 319 (1972), and Haines v. Kerner, 404 U.S. 519 (1972); the requirement of liberal construction does not mean that the court can ignore a clear failure in the pleadings to allege facts which set forth a federal claim, nor can the court assume the existence of a genuine issue of material fact where none exists. Weller v. Dep't of Social Services, 901 F.2d 387 (4th Cir. 1990).

Respondents contend in their motion, inter alia, that the Petition is subject to dismissal because Petitioner failed to file this application for a writ of habeas corpus in federal court within the one (1) year following the exhaustion of his state court remedies. After careful review of the record and arguments presented, the undersigned is constrained to agree.

As provided by statue, this limitation period

runs from the latest of -

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such a review;
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable on collateral review; or
> (D) the date on which the factual predicate of the claim presented could have been discovered through the exercise of due diligence.

28 U.S.C. 2244(d)(1).

Section 2244(d)(1) is part of the Anti-terrorism and Death Penalty Act ("AEDPA"), which became effective on April 24, 1996. Under this statue, Petitioner was required to file his federal habeas petition by at least April 24, 1997, unless the statue was tolled. See Pub. L. 104-132, Title I, 104, 110 Stat. 1218; Brown v. Angelone, 150 F.3d 370-371 (4th Cir. 1998) [adopting one (1) year as the reasonable period]; Lindh v. Murphy, 96 F.3d 856, 866 (7th Cir. 1996) (en banc), cert. granted in part, 117 S.Ct. 726 (1997), rev'd on other grounds, 117 S.Ct. 2059 (1997); Duarte v. Hershberger, 947 F. Supp. 146, 148-149 (D.N.J. 1996); see also Curtis v. Class, 939 F. Supp. 703, 705-708 (D.S.D. 1996).

The filing of an APCR will normally toll the running of the statue. However, when Petitioner filed his APCR on June 19, 1996, fifty-six (56) days of non-tolled time had already passed. The period of

limitations was thereafter tolled during the pendency of Petitioner's APCR, until February 27, 2001, when the Remittitur was sent after the South Carolina Supreme Court denied certiorari. See eg Ott v. Johnson, 192 F.3d 510 (5th Cir. 1999)[tolling does not include 90 days for United States Supreme Court certiorari petition from final denial by state's highest court of collateral action], cert. denied, 529 U.S. 1099 (2000);Harris v. Hutchinson, 209 F.3d 325 (4th Cir. 2000)[running clock from when state appellate court denied leave to appeal denial of state post-conviction petition];Mays v. Hickman, No. 98-56769,2000 WL 538131 (9th Cir. May 3, 2000). By the time Petitioner filed this action on February 21, 2002, three hundred and fifty-nine (359) additional days of non-tolled time had accrued since the disposition of his APCR.

When the pre- and post- APCR time periods are added, over four hundred and fifteen (415) days of non-tolled time passed from when Petitioner's period of limitations began to run on the AEDPA's effective date to filing of this federal petition. Accordingly, petitioner failed to timely file this federal petition, and he is barred from seeking federal habeas relief. Artuz v. Bennett, 513 U.S. 4 (2000)[while collateral review tolls the one-year statue of limitations under 2244(d)(A), it does not establish a right to file within one year after of completion of collateral review]; Pearson v. North Carolina, 130 F.Supp.2d 742 (W.D.N.C. 2001); Calderon v. U.S. District Court of California, 127 F.3d 782, 785-787 (9th Cir. 1997), cert. denied, 118 S.Ct. 1395 (1998), overruled on other grounds in later appeal, 163 F.3d 530 (9th Cir. 1998), cert. denied, 119 S.Ct. 1377 (1999);Andrews v. Johnson, 976 F.Supp. 527 N.D. Tex. 1997);Harris, 209 F.3d at 328 [where petitioner's direct review concluded in 1992, and

petitioner did not file for PCR until ten-and-one-half months after AEDPA's effective date of April 24, 1996, the ten-and-one-half months counted against his period of limitations, which expired one-and one-half months after his PCR was finally concluded in January 1998].

While Petitioner concedes that he failed to timely file this Petition, he argues that he should be excused from this requirement because his appellate counsel allegedly told him that he had one year from the date that the Remittitur was issued from the Supreme Court on his PCR appeal to file his habeas petition. However, even in assuming this representation to be true, the Fourth Circuit has held that circumstances will rarely warrant equitable tolling. Additionally, Petitioner carries the burden of showing that he is entitled to equitable tolling. Harris, 209 F.3d at 330; see also Marengo v. Conway, 342 F.Supp.2d 222, 230 S.D.N.Y. 2004); Miranda v. Castro, 292 F.3d 1063, 1066 (9th Cir. 2002). Equitable tolling applies to only in the rare and exceptional circumstance, and is limited to "extraordinary circumstances" preventing a prisoner from filing a timely petition. Warren v. Garvin, 219 F.3d 111, 113 (2d Cir. 2000); Marengo, 342 F.Supp.2d at 230. Further, to obtain equitable tolling "the party seeking equitable tolling must have acted with reasonable diligence throughout the period he seeks to toll." Marengo, 342 F.Supp2d at230 (quoting Warren, 219 F.3d at 113).

Here, even assuming that Petitioner's state appellate counsel gave him incorrect advise, the Fourth Circuit has held that "a mistake by a party's counsel in interpreting a statue of limitations does not present extraordinary circumstances beyond the party's control where equity should step in to give the

party the benefit of his erroneous understanding." Rouse v. Lee, 339 F.3d 238, 248 (4th Cir. 2003) (quoting Harris, 209 F.3d at 331). "In non-capital cases, attorney error, miscalculation, inadequate research, or other mistakes have not been found to rise to the 'extraordinary' circumstances required for equitable tolling." Merrit v. Blaine, 326 F.3d 159, 169 (3d Cir. 2003)(quoting Fahy v. Horn, 240 F.3d 239, 244 (3d Cir. 2001); see also Johnson v. Hendricks, 314 F.3d 159, 163 (3d Cir. 2002);Frye v. Hickman, 273 F.3d 1144, 1146 (9th Cir. 2001). The Fourth Circuit in Rouse noted that a number of other circuits agree with this interpretation. Rouse, 339 F.3d at 248. See also; Plowden, 78 F.Supp.2d at 119 [In denying equitable tolling, the Court also considered that Petitioner had a brief window (two weeks) in which to file a timely petition upon learning of the procedural posture of the case];Maraj v. Gillis, No. 04-1544,2005 WL 23336*2 (E.D.Pa.Jan.4,2005) ["Assuming, without deciding, that [Petitioner's] factual assertion [that neither he nor his counsel received the Superior Court February 24th judgment until June 7, 2000] is correct, [Petitioner] has failed to allege or demonstrate how this circumstance *prevented* hime from filing his habeas petition in a timely manner"]. Therefore, Petitioner is not entitled to equitable tolling under the facts of this case.

Conclusion

Based on the foregoing, the undersigned has no choice but to recommend that the Respondents' motion for summary judgment be **granted**, and that the Petition be **dismissed,** with prejudice, for having been filed outside the applicable statue of limitations. 28 U.S.C. 2244(d).

The parties referred to the Notice Page attached hereto.

"s/ BM "

Bristow Marchant
United States Magistrate Judge

Columbia, South Carolina
October 19, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

Gary Phillip Brogdon,	) Civil Action No:
	) 0:02-0483-CWH
Applicant,	)
	)
vs.	) ORDER
	)
Charles Condon,	)
Attorney General for the State of	)
South Carolina	)
Respondent,	)
_____	)

In May, 1982, the Berkeley County Grand Jury charged the petitioner with kidnapping, assault with a deadly weapon, and criminal sexual conduct. In November, 1982, the Berkeley County Grand Jury charged the petitioner in a second indictment with kidnapping and aggravated assault and battery. On November 9, 1982, a jury acquitted the petitioner of the charges contained in the first indictment but convicted the petitioner of the kidnapping and aggravated assault charges found in the second indictment. On November 30, 1983, the South Carolina Supreme Court affirmed the conviction.

On June 19, 1996, the petitioner filed an application for Post Conviction Relief (PCR) in state court. On October 22, 1998, the application was denied, and the petitioner appealed. The South Carolina Supreme Court denied certiorari and remitted the action on February 27, 2001.

On February 21, 2002, pursuant to 28 U.S.C. 2254, the petitioner commenced his *pro se* action attacking his state conviction. The respondents filed a

motion for summary judgment on August 1, 2005, claiming that the statue of limitations barred this action. On August 2, 2005, the Court issued a *Roseboro* order advising the petitioner of summary judgment dismissal procedure and informing the petitioner that he must adequately respond within 34 days of the date of order. On October 7, 2005, the petitioner responded.

On October 19, 2005, Magistrate Judge Bristow issued a report analyzing the issues and recommending dismissing the action as untimely. On November 3, 2005, the petitioner filed an objection to the report and recommendation. This matter is now ready for disposition.

On April 24, 1996, as part of the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. 2254(d) took effect as a statue of limitations for federal *habeas corpus* relief:

> (d)(1) A 1-year period of limitations shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitations shall run from the latest of-
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the explanation of the time for seeking such review;
> > (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
> > (C) the date on which the constitutional right asserted was

initially recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

The statue of limitations began running on April 24, 1996. Harris v. Hutchinson, 209 F.3d 325, 328 (4th Cir. 2000); see also Brown v. Angelone, 150 F.3d 370, 375 (4th Cir. 1998). The limitations period, however was tolled when the petitioner filed his application for PCR on June 19, 1996. The South Carolina Supreme Court remitted the PCR action on February 27, 2001. As a result, the statue of limitations began running again on February 27, 2001. Harris, 209 F.3d at 328.

The petitioner filed this action on February 21, 2002. The amount of time between the enactment of section 2244 on April 24, 1996, and when the limitations period was tolled on June 19, 1996, and the time between the date when the PCR action was dismissed on February 27, 2001 and the date when the petitioner filed this action, February 21, 2002, totals 415 days, violating the one-year of limitations set forth in section 2244.

The petitioner contends that appellate counsel, who represented him during the PCR appeal, advised

the petitioner that he had one year from the date the South Carolina Supreme Court remitted his PCR application. Equitable tolling is available only in rare instances where circumstances external to the party's own conduct cause the application of the statue of limitations to be unconscionable and a gross injustice would result. Harris, 209 F.3d at 331; see also Rouse v. Lee, 339 F.3d 238, 246 (4th Cir.2003). A time-barred petitioner, therefore, must present "(1) extraordinary circumstances, (2) beyond his control or external to his own conduct, (3) that prevented him from filing on time." Rouse, 339 at 246. "[A] mistake by a party's counsel in interpreting a statue of limitations does not present extraordinary circumstances beyond a party's control where equity should step in to give the party the benefit of his erroneous understanding." Harris, 209 F.3d at 331.

This action has been filed outside the one-year limitations provided in 28 U.S.C. 2244(d)(1). Accordingly, the Court adopts the report and recommendations and dismisses this action with prejudice.

AND IT IS SO ORDERED.

"s/ C. Weston Houck "
C. WESTON HOUCK
UNITED STATES DISTRICT JUDGE

January 24, 2006

Charleston, South Carolina

AO450-Judgmnet in a Civil Case

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

Gary Phillip Brogdon,
Petitioner

vs.

Charles M. Condon,
Attorney General for
South Carolina;

Respondent

JUDGMENT IN A CIVIL CASE

Case number: 0:02-483-CWH-BM

Decision on the record. This action came before the Court on the record, The Honorable C. Weston Houck, United States District Judge, presiding. The issues have been reviewed and a decision rendered, and the Court having adopted the Report and Recommendation of Judge Bristow Marchant which recommends dismissal.

IT IS SO ORDERED AND ADJUDGED that the petitioner shall take nothing from the respondent on his petition filed pursuant to Title 28 U.S.C. 2254 and the case is dismissed without prejudice.

LARRY W. PROPES, Clerk
By "s/ Anne R Henly"
Deputy Clerk

January 25, 2006

JUDGMENT

FILED: May 31, 2006

UNITED STATES COURT OF APPEALS
for the
Fourth Circuit

No. 06-6236
0:02-cv- 00483-CWH

GARY PHILLIP BROGDON
Petitioner - Appellant

v.

CHARLES M. CONDON, Attorney General of the State of South Carolina

Respondent - Appellee

Appeal from the United States District Court for the District of South Carolina at Rock Hill

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In accordance with the written opinion of this Court filed this day, the Court denies a certificate of appealability and dismisses the appeal.

A certified copy of this judgment will be provided to the District Court upon issuance of the mandate. The judgment will take effect upon issuance of the mandate.

/s/ Patricia S. Connor
CLERK

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06- 6236

GARY PHILLIP BROGDON,

Petitioner - Appellant

Versus

CHARLES M. CONDON, Attorney General of the State of South Carolina,

Respondent - Appellee

Appeal from the United States District Court for the District of South Carolina, at Rock Hill. C. Weston Houck, Senior District Judge. (0: 02-cv-00483-CWH)

Submitted: May 18, 2006 Decided: May 31,2006

Before WIDNER and WILKINSON, Circuit Judges and HAMILTON, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Gary Phillip Brogdon, Appellant Pro Se. Donald John Zelenka, Chief Deputy Attorney General, Derrick K McFarland, OFFICE OF THE ATTORNEY GENERAL OF SOUTH CAROLINA, Columbia, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36 (c).

PER CURIAM:

Gary Phillip Brogdon seeks to appeal the district court's order adopting the recommendation of the magistrate judge and granting summary judgment to Respondents and dismissing as untimely Brogdon's petition filed under 28 U.S.C. 2254 (2000). The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. 2253 (c) (1) (2000). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253 (c) (2) (2000). A prisoner satisfies this standard by demonstrating that reasonable jurists would find that his constitutional claims are debatable and that any dispositive procedural rulings by the district court are also debatable or wrong. See Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 484 (2000); Rose v. Lee, 252 F.3d 676, 683 (4th Cir. 2001). We have independently reviewed the record and conclude that Brogdon has not made the requisite showing. Accordingly, we deny a certificate of Appealabilty and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decision process.

DISMISSED

UNITED STATES COURT OF APPEALS
FOR THE FOUTH CIRCUIT

FILED
June 22, 2006

No. 06-6236
0:02-cv-00483-CWH

GARY PHILLIP BROGDON
Petitioner - Appellant

V.

CHARLES M. CONDON, Attorney General of the State of South Carolina
Respondent - Appellee

MANDATE

The judgment of this Court, entered 5/31/06, takes effect this date.

A certified copy of this Court's judgment and a copy of its decision are issued to the district court and constitute the mandate of this Court.

/s/ Patricia S. Connor

CLERK